Hostile Environment?

The Development of Sexual Harassment Law in the United States 1971 – 1991

By

Pamela Coukos

A dissertation submitted in partial satisfaction of the
requirements for the degree of
Doctor of Philosophy
in
Jurisprudence and Social Policy
in the
Graduate Division
of the
University of California, Berkeley

Committee in Charge:
Professor Lauren B. Edelman, Chair
Professor Malcolm M. Feeley
Professor Taeku Lee

Fall 2011

Abstract

Hostile Environment?

The Development of Sexual Harassment Law in the United States 1971 – 1991

by

Pamela Coukos

Doctor of Philosophy in Jurisprudence and Social Policy

University of California, Berkeley

Professor Lauren B. Edelman, Chair

How did the sexual harassment litigation campaign succeed in defining a new antidiscrimination principle in the midst of the Reagan-era backlash against civil rights? In 1986, the U.S. Supreme Court definitively established sexual harassment as a violation of Title VII. *Meritor v. Vinson,* 477 U.S. 57 (1986). This unanimous conclusion, with an opinion drafted by conservative jurist William Rehnquist, capped a series of victories for sexual harassment plaintiffs in the federal appellate courts. This feminist revolution gained steam at the same moment as the Reagan-era conservative backlash against civil rights law began. Legal accountability for sexually hostile work environments seemingly developed in a hostile political environment.

My aim is to use this case to ask when and how organized rights mobilization can be effective despite a seemingly hostile political climate. In particular, I explore the role of litigants, who make important decisions about how rights are contested in our legal system. The work of parties in general, and social movements in particular, remains both relatively under-theorized in public law, and frequently absent from prominent empirical works.

Working from findings of socio-legal literatures on claims mobilization, law and organizations, and law and social movements, I identify and assess potential explanatory factors: (1) characteristics and strategies of the individuals, lawyers, and movement organizations who engaged the legal system for and against this claim; (2) the political opportunity structure; (3) networks and resources provided by organizations and professionals, which act to construct and diffuse legal meaning and engage the legal system and (4) how law itself serves as a resource to movements and individuals mobilizing rights. While this literature, taken together, provides a potential theoretical framework, little prior work specifically addresses how social movements use law to overcome politically hostile opponents.

In a multi-method study I ultimately conclude that a combination of historically fortuitous timing, differences in organization and engagement between proponents and opponents, and the effect of path-dependent legal decisionmaking made it possible to defend a liberal legal expansion during a period of civil rights retrenchment. I also find evidence that the shift in partisan control had a lagged negative effect on plaintiff success rates.

TABLE OF CONTENTS

Chapter 1 (Introduction) **p. 1**

How Did Sexual Harassment Law Surive the Reagan Revolution?

The project begins with an introduction to the theoretical puzzle – why did a judge-made liberal legal expansion occur over a time period of increasingly conservative national (and judicial) politics and a general civil rights retrenchment in law?

Chapter 2 **p. 21**

From MacKinnon to Meritor:

Grassroots Litigants and Lawyers Build to an Organized Feminist Mobilization (1971-1986)

This chapter asks how this new rights claim emerged, and to what extent existing models of law and social change account for its initial development.

Chapter 3 **p. 46**

Backlash Politics and Sexual Harassment Law (1981-1991)

This chapter asks how a changing political opportunity structure affected the trajectory of this claim. It analyzes how Reagan-era politics interacted with more sophisticated organizing and emerging legal constraints during the 1980's.

Chapter 4 **p. 59**

Law, Politics and Social Change

This chapter asks how much legal rules and norms explain the trajectory of sexual harassment claims, and uses this case to add to current public law debates between a legal model of courts and a judicial politics model.

Chapter 5 **p. 93**

Conclusion: Fitting This Case Into a Law and Society Framework

In summarizing the prior analysis, this chapter also places the key findings of this case about individual mobilization, organizational strength, the effect of legal rules and the role of partisan politics into a larger theoretical framework.

Bibliography **p. 100**

Appendix 1 Court of Appeals Cases in Dataset **p. 110**

Appendix 2 District Court Cases in Dataset **p. 114**

Appendix 3 Variables Coded in Court of Appeals Dataset **p. 116**

Appendix 4 Timeline of Significant Events **p. 122**

FIGURES AND TABLES

Chapter 1

Figure 1	Proposed Model	p. 17

Chapter 2

Figure 2	Model of Social Movement Tactical Choices	p. 25
Table 1	States Where Sexual Harassment Cases Filed in Federal Court	p. 34
Table 2	Summary of Case Outcomes through 1981	p. 37
Figure 3	Pre-1980 Sexual Harassment Cases Featuring Social Movement Support/Activity	p. 42

Chapter 3

Table 3	Sexual Harassment Charges Before US EEOC 1980 – 1991	p. 56

Chapter 4

Figure 4	Nodes Ranked by In Degree	p. 77
Figure 5	Race Bridge Cases in the Network	p. 78
Figure 6	Democratic or Republican Panels in the Network	p. 79
Figure 7	Plaintiff and Defendant Wins in the Network	p. 80
Figure 8	Governmental and Organizational Support Cases in the Network	p. 81
Table 4	Factors Related to Higher Citation Rates (without effect of time)	p. 82
Table 5	Factors Related to Higher Citation Rates (with effect of time)	p. 82
Table 6	Factors Related to Greater Centrality	p. 83
Table 7	Factors Related to Increased Likelihood of Plaintiff Win	p. 85
Table 8	Win Rates Before and After Meritor Ruling	p. 86
Figure 9	Changes in Plaintiff Win Rates Over Time	p. 86
Figure 10	Changes in Ideological Composition of Deciding Judges Over Time	p. 87
Table 9	Pre-Meritor Cases and Partisan Voting Patterns	p. 88
Table 10	Post-Meritor Cases and Partisan Voting Patterns	p. 88
Table 11	Factors Related to Increas. Likelihood of Voting for Pl. (1977-1991)	p. 89
Table 12	Factors Related to Increas. Likelihood of Voting for Pl. (1977-1986)	p. 90
Table 13	Factors Related to Increas. Likelihood of Voting for Pl. (1986-1991)	p. 90
Table 14	Legal Issues Related to Increase. Likelihood of Voting for Pl.	p. 91

ACKNOWLEDGEMENTS

There are many people I wish to acknowledge for their contributions to this project, and to my graduate work at the University of California. First and foremost, I want to thank the members of my committee, Lauren Edelman, Malcolm Feeley, and Taeku Lee, who have been outstanding teachers and mentors. They have shared large quantities of high level theory and practical advice, and I feel privileged to have taken so much of both. Many other faculty at the Jurisprudence and Social Policy Program -- including Catherine Albiston, Robert Kagan, Kristin Luker, Robert MacCoun, Daniel Rubinfeld and Jonathan Simon -- and at the other departments at Berkeley -- including Henry Brady, Laura Stoker and Kim Voss -- helped me build the interdisciplinary theoretical and methodological toolkit I needed to develop and carry out my research. There are so many of my fellow graduate students at JSP who contributed time and energy to workshop material, share ideas and provide mutual support that it would be impossible to list them all. I especially want to thank Ming Hsu Chen, Tamara Lave, Gwendolyn Leachman, and Pablo Rueda for their contributions to this dissertation. I was fortunate to have the financial support of the Berkeley Fellowship and additional support from the JSP program to attend conferences, workshops and the ICPSR Summer Program.

On a personal note, I want to thank friends and family members who provided critical encouragement when I needed it the most: Andrea Coukos, Stephen Coukos, Carolyn DeLaPena, Eileen Goldsmith, Katherine Haenschen, Sean Knox, Daniel Laurison, Margot Reed, Linda Sanches, Dana Santa Cruz, and Mary Jane Stevenson. Thank you to my mother, Carolyn Coukos, who proofread every page of the final draft and who I have leaned on many times over these last six years for much more. Thank you to my children, Bennett and Jamie Coukos-Wiley, who have showed me how love and persistence can overcome many obstacles and countless mistakes. And to David Wiley, thanks seem woefully insufficient to recognize how much you have given to me and of yourself -- I will simply say I could not have done it without you.

CHAPTER 1 (INTRODUCTION):

HOW DID SEXUAL HARASSMENT LAW SURVIVE THE REAGAN REVOLUTION?

Abstract: The project begins with an introduction to the theoretical puzzle – why did a judge-made liberal legal expansion occur over a time period of increasingly conservative national (and judicial) politics and a general civil rights retrenchment in law? How did a brand new civil rights regime survive challenges from a politically hostile President, EEOC, bench and business community? This chapter sets the stage by summarizing the historical context and key developments, and reviews the main theoretical accounts of legal change. It reviews the existing explanations for the development of sexual harassment law and their limitations. It then describes the data and methods and briefly summarizes the chapters that follow.

SUMMARY

In 1986, the U.S. Supreme Court definitively established sexual harassment as a violation of Title VII. *Meritor v. Vinson,* 477 U.S. 57 (1986). This unanimous conclusion, led by an opinion authored by conservative jurist William Rehnquist, capped a series of victories for sexual harassment plaintiffs in the federal appellate courts. Sexual harassment law, developed and implemented by judicial interpretation, not statute, has ultimately dramatically altered the workplace culture of the United States. But this feminist revolution gained steam at the same moment as the Reagan-era conservative backlash against civil rights law began. Legal accountability for sexually hostile work environments seemingly developed in a hostile political environment. Why did the sexual harassment litigation campaign succeed in establishing a new legal right in the face of these political obstacles?

This case presents the chance to explore when and how organized rights mobilization can be effective despite an apparently hostile political climate. Although some scholars have identified rights-based movements as salient and effective political actors,[1] others view this kind of impact litigation strategy as no more than "flypaper" for unwary activists.[2] Ultimately, the work of parties in general, and social movements in particular, remains both relatively under-theorized in public law, and frequently absent from prominent empirical works.[3] This is

---

[1] Charles R. Epp, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVES (1998); Michael McCann, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

[2] Gerald Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

[3] Michael McCann, *Law and Social Movements, in* Austin Sarat, ed., THE BLACKWELL COMPANION TO LAW AND SOCIETY 506 (2004); Margo Schlanger*, Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICHIGAN LAW REVIEW 1994 (1999).

surprising, given that parties to litigation set the agenda and make critical determinations defining the scope of policy choices before the courts.

Over the first two decades of sexual harassment law in the United States, four different kinds of litigants emerged to establish and contest the scope of a new right to be free from sexual harassment in the workplace. First, in the early 1970's, individual women acting on their own initiative seized new workplace anti-discrimination rights to challenge bosses who treated them as sexual objects. This semi-spontaneous and novel application of Title VII fairly quickly evolved into a highly organized effort by women's and civil rights social movement organizations to establish sexual harassment as a legally-recognized form of sex discrimination. In the meantime, the U.S. Equal Employment Opportunity Commission (EEOC) served as a catalyst by participating in litigation and writing regulations that anchored this brand-new concept against a Reagan-era backlash. Finally, organized employer groups like the Chamber of Commerce ultimately helped usher in an era of retrenchment – although their failure to mount any early aggressive challege in the appellate courts probably made it impossible for them to fully roll the new law back.

Key findings of socio-legal literatures on claims mobilization, law and organizations, and law and social movements provide a theoretical framework for assessing these litigants and their efforts at legal mobilization. These works suggest four areas worthy of analytic inquiry: (1) characteristics, tactics and framing strategies of the individuals, lawyers, and movement organizations involved in mobilization;[4] (2) the political opportunity structure within which mobilization occurs;[5] and (3) networks and resources provided by organizations and professionals, which act to construct and diffuse legal meaning and engage the legal system.[6] In addition, I consider (4) whether law itself serves as a resource to movements and individuals mobilizing rights.[7] While this literature, taken together, provides a potential theoretical

---

[4] Nicholas Pedriana*, From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960's,* 111 AMERICAN JOURNAL OF SOCIOLOGY 1718 (2006); Thomas Hilbink, *You Know the Type: Categories of Cause Lawyering,* 29 LAW AND SOCIAL INQUIRY 657 (2004); Myra Marx Feree, Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany, 109 AMERICAN JOURNAL OF SOCIOLOGY 304 (2003); McCann, *supra* note 1.

[5] Doug McAdam, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930–1970 (1982).

[6] Lauren B. Edelman, Christopher Uggen, Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AMERICAN JOURNAL OF SOCIOLOGY 406 (1999); Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice,* 26 FLORIDA STATE UNIV. LAW REVIEW 959 (1999); Epp, *supra note* 1.

[7] Lauren B. Edelman, Gwendolyn Leachman, Doug McAdam, *On Law, Organizations and Social Movements,* 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 653 (2010); Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOCIETY REVIEW 11 (2005); Francesca Polletta,

framework for testing mobilization, little prior work specifically addresses the use of law to overcome politically hostile opponents.

Considering how the actions of litigants shaped a major policy initiative over a twenty-year time period expands longstanding scholarly debates over the political agency of judges in the American system. The emerging consensus in public law is that judges are political policymakers who carry out their role in the context of a larger legal institutional structure. Scholars contend over whether political ideology is dominant or subverted to law in various contexts, but tend to place their findings along a sliding scale with "law" on one end and "politics" on the other.[8] Following the sociolegal tradition of looking for explanations in how social actors construct, deploy and respond to law, this study also evaluates the political contributions of litigants -- who are using law to advance ideologically distinct policy preferences as well as to resolve claims of injury. The interaction of these parties with a bench whose composition changed dramatically over time from liberal to conservative yielded a complex set of outcomes that includes evidence of both expansion and contraction.

This case also complicates the question of whether it benefits social movements to use litigation in advancing social change. It challenges the underlying assumption that social movement organizations have free range to set the agenda and choose the fora of dispute. Movements may exercise strategic choices based on litigation decisions by individuals that are different than the choices as presented in the abstract. Indeed, in the American legal system where any individual is free to proceed as long as they are injured in fact, no social movement organization can truly strategically control the timing or circumstances of how courts address social issues.[9] Here it appears that individual semi-spontaneous claims filing predated organized social movement litigation in this area, and fueled the development of a larger network of activists and lawyers. That network in turn enabled the new legal theory to survive by successfully "playing for rules" and organizing to resist political backlash. This relationship between individual and strategic litigation is a factor worthy of greater attention in the future.

In the chapters that follow, I review the historical development of sexual harassment law during two critical early decades as a series of inter-related factors. First, I focus on the role of the major proponents in establishing the right to be free from sexual harassment at work: (1)

The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-66, 34 LAW AND SOCIETY REVIEW 367 (2000); McCann, *supra* note 1.

[8] Emerson H. Tiller and Frank B. Cross, *What Is Legal Doctrine?* 100 NORTHWESTERN UNIVERSITY LAW REVIEW 517 (2006); Lee Epstein and Jack Knight, *Courts and Judges, in*, Austin Sarat, ed., THE BLACKWELL COMPANION TO LAW AND SOCIETY 170 (2004).

[9] The history of marriage equality litigation is another example where individual claimants led and social movement organizations largely followed, often against their publicly stated preferences. *See, e.g.,* Scott Cummings and Douglas NeJaime, 57 U.C.L.A. Law Rev. 1235, *Lawyering for Marriage Equality* (2010); Dana E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg,* 17 BUFFALO J. OF LAW AND GENDER POLICY 1 (2009).

individual plaintiffs and their lawyers, (2) social movement organizations, and (3) the U.S. EEOC (Chapter 2). Next, I consider the larger political context within which this advocacy proceeded, and in particular how that context changed over time from more liberal to largely but not uniformly conservative, and how differences in tactics and resources between proponents and opponents limited the impact of the partisan political shift (Chapter 3). Finally, I test the effect of partisan politics on outcomes in light of prevailing liberal or conservative doctrinal and regulatory rule regimes to see how much the work to establish and challenge these legal structures might matter (Chapter 4). The rest of this introductory chapter provides an overview of the project: the key political and doctrinal developments, an analysis of how this project fits within the existing literature, and a summary of the data and methods.

Ultimately this study concludes that a combination of historical accident, differing levels of organization, and the path-dependent effect of legal structures enabled sexual harassment law to survive the Reagan Revolution:

- **Fortuituous historical timing:** Generally (though not uniformly) liberal and therefore more politically sympathetic judges decided the early appellate cases beginning in the late 1970's. President Carter's Chair of the EEOC got agency regulations finalized literally weeks before Ronald Reagan took office. Thus, when significant numbers of conservatives joined the appellate bench they faced an existing status quo in favor of the new law.
- **Clear differentials in organized political mobilization:** Looking at participation in litigation and use of legislative and regulatory opportunities reveals an organized set of proponents against an opposition that mobilized more slowly. Activity by the femininsts advocating in favor of the new claim massively overshadowed public business community opposition through the mid-1980's.
- **Regulatory and Doctrinal "Anchors."** Both of these factors established a favorable underlying set of laws and regulations that limited the ability of a conservative and pro-business EEOC, Administration and judiciary to oppose the new claim. Instead, opponents sought to limit its expansion, bolster defenses and win factual debates – not insignificant avenues of retrenchment but ones that permitted sexual harassment to survive and become the significant workplace right it remains today.

Ultimately, the quantitative analysis reveals that after the basic legal principle became "settled" in 1986, the terrain of litigation shifted to issues that enabled conservative politics to limit the success of sexual harassment plaintiffs.

While a single case can only go so far in advancing our empirical understanding of the role of organized litigation in politically contested policy areas, this case suggests at least three conclusions worthy of further testing and refinement.

In the first place, law can matter to movements. Law serves as a resource to challenge and engage the state on your behalf. Getting formal law determinations in your favor – agency rulings, court decisions -- can prove useful not just in advancing social change but also in resisting a negative change in the larger political environment. And it is worthwhile for activists to be open to the use of formal legal structures, because even if social change litigation is not

on the agenda now, it might be placed there by individuals seeking redress. This does not undercut the significant question of the potential costs of a litigation strategy, but it does expand the conversation about both benefits and opportunities.

In the second place, law can matter to politics. Establishing a particular policy vision as the status quo, especially where legislative and regulatory decisions reinforce judicial decisions, can generate critical path-dependent results. When liberal legal decisions sufficiently established the right, even conservative judges accepted it, and even a newly conservative civil rights agency had to champion it in court. The idea that legal precedent is some "neutral" or nonideological counterweight to partisan politics misses how law itself can embed and reinforce a more partisan policy agenda.

Finally, organization can matter to success. Using law to advance movement objectives or resist political hostility requires going beyond building a theory or filing a test case. Strategic collaboration and participation in multiple fora of dispute may increase the likelihood of success. Unorganized adversaries can leave a vacuum that bolsters movement results. Whether political actors succeed in deploying law in support of their policy vision may be a function of differences in organization. This project is a theory-generating first step toward a full framework to measure and assess that difference.

In 1971 sexual harassment was neither illegal nor socially disfavored; by 1991 it was concerning enough to frame an intense media and political debate over a Supreme Court nomination. Over this twenty year time period private and public litigants established this new right. Through litigation defining its scope and application, they also acted to construct a body of law and a larger organized network of proponents. Over this same time period, conservative politicians and the business community largely failed at direct efforts to halt the new law's progress but successfully identified some defenses and limitations. The core objective of this study is to identify potential explanations for a seemingly anomalous case: the dramatic contrast between an increasingly conservative political environment and a successful liberal rights-based expansion of law. Ultimately this analysis can serve as a basis not just to try to understand this single case, but also to offer some new theoretical insights about the relationship between law, politics, and social movements.

A NEW CIVIL RIGHT

Establishing the right to be free from sexual harassment at work represented a landmark feminist legal advance. Beginning in the early 1970s, courts began considering the question of whether to apply existing civil rights laws barring sex discrimination at work to sexual propositions, comments, and assaults. Although now equating sexual harassment with sex discrimination seems straightforward, at the time it represented a substantial legal innovation. As one federal judge ruling against an early sexual harassment plaintiff explained:

> In the present case, Mr. Price's conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge. Certainly no employer policy is here involved . . . Nothing in the complaint alleges nor can it be construed that the

> conduct complained of was company directed policy which deprived women of employment opportunities. . . an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.[10]

Despite the novelty of applying anti-discrimination law to workplace sexual harassment, plaintiffs successfully challenged conduct previously considered "private" and "interpersonal," and effectively beyond the scope of the state to regulate. Litigation over the next eleven years would overcome this type of opposition to shape a new legal claim, ultimately finding broad acceptance in the courts.

In the beginning, individual plaintiffs and their lawyers took the initiative. In dozens of cases filed in at least 16 different states, an eclectic array of civil rights lawyers, feminist lawyers, general law practitioners and academics represented women seeking remedies for workplace injury.[11] Many of these early cases involved plaintiffs who lost jobs or opportunities for turning down advances from their bosses – what would become known as *quid pro quo* sexual harassment. A few of these early pioneers pursued a theory that enduring sexual harassment at work itself could be harmful, even without a formal loss of job or pay, laying the groundwork for so-called "hostile work environment" cases. As earlier studies have documented, multiple early plaintiffs and lawyers arrived independently at the idea that Title VII, the existing federal law against sex discrimination in employment, could be applied to their situation.[12] This semi-spontaneous grassroots legal uprising laid the groundwork for later legal advances, feminist theorizing and social movement organizing.

While these early cases developed in the federal district courts, feminists formed the beginnings of a larger movement-based organizational structure. During the early to mid-1970's, a few new grassroots organizations sprang up to address sexual harassment, applying feminist theory and consciousness-raising tools, and also encouraging women to pursue legal remedies.[13] Existing women's rights and civil rights legal organizations began to participate in sexual harassment litigation, increasing the resources available to plaintiffs, especially at the appellate level. And Catherine MacKinnon built on the early court rulings and activism to develop a broader theoretical critique of sexual harassment, and why it violated existing federal law barring gender discrimination in the workplace.[14] By the close of the decade, it was

---

[10] *Corne v. Bauch & Lomb,* 390 F.Supp. 161, 163 (D.Ariz. 1975).

[11] *See infra* Chapter 2.

[12] Carrie N. Baker, THE WOMEN'S MOVEMENT AGAINST SEXUAL HARASSMENT (2008); Anna-Maria Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 LAW & SOCIAL INQUIRY 761 (1998).

[13] *See generally* Baker, *supra* note 12.

[14] Catherine A. MacKinnon, THE SEXUAL HARASSMENT OF WORKING WOMEN (1979).

possible to identify a clear network of organized legal advocates who led the development of this new legal doctrine.[15]

At the same time, the EEOC took a serious interest in this new claim. Sexual harassment allegations began appearing in charge filings in the early 1970's, putting the question before the agency of whether to consider this a form of sex discrimination. Ultimately, as explained in Chapter 2, the EEOC would become a major player in litigation, both filing cases and appearing as an *amicus curiae* ("friend of the court"). But the presence of a true social movement "insider" may have been most sigificant.[16] Eleanor Holmes Norton, appointed by President Carter to head the EEOC and exposed to the issue of sexual harassment by activists when she worked for New York City, issued regulations that established a legal framework for assessing sexual harassment. Those regulations – finalized in the waning days of the Carter Administration – established all the essential aspects of the claims and defenses and would frame the issues in litigation going forward for a decade.[17]

The combined efforts of all three types of litigants successfully persuaded courts to establish a right to be free from sexual harassment at work. Although the record in the district courts was mixed, the record on appeal was not. Every appellate judge – liberal or conservative - who considered the basic question of whether sexual harassment was illegal sex discrimination answered affirmatively, extended the theory from *quid pro quo* cases to hostile environment cases, and held employers responsible for the vast majority of contexts presented.[18] In reaching these conclusions, courts looked to a combination of existing sex discrimination precedents, holdings and theories involving prior race discrimination claims, and post-1980, the EEOC's guidelines. There is simply no evidence appellate judges had *Corne*-style concerns about regulating private or interpersonal conduct.[19]

But just as the beginnings of doctrinal consensus emerged, the environment became far more hostile to a judge-made expansion of U.S. civil rights law. The 1980 election of Ronald Reagan and the rise of the New Right escalated challenges to numerous well-established civil

---

[15] *See infra* Chapters 2 and 3.

[16] Wayne A. Santoro and Gayle M. McGuire, *Social Movement Insiders: The Impact of Institutional Activists on Affirmative Action and Comparable Worth Policies*, 44 SOCIAL PROBLEMS 503 (1997).

[17] *See infra* Chapter 2.

[18] *See infra* Chapters 2, 4.

[19] Although it goes beyond the scope of this project, it is fascinating to compare the straightforward application of Title VII in these cases with those decided decades later regarding civil rights remedies for rape and domestic violence. *U.S. v. Morrison,* 529 U.S. 598 (2000). It may be, that as MacKinnon herself observed, "the right to be free from rape in marriage" is harder to establish than such a right in the workplace, because "in employment, the government promises more." MacKinnon, *supra* note 14 at 7.

rights legal rules and institutions.[20] Increasing conservative appointments to the federal bench, a series of appellate and Supreme Court decisions rolling back federal anti-discrimination law on various fronts, a dramatic ideological shift to the right at the EEOC and U.S. Department of Justice, and a broader cultural backlash against civil rights gains of the prior two decades, seemingly stacked the deck against further liberal legal expansion.

More significantly, in early 1981, the Reagan Administration explicitly sought to undercut this new legal theory.[21] As part of a larger business-friendly regulatory review, the OMB requested an internal assessment of the EEOC guidelines on sexual harassment. Surprisingly, under new conservative leadership the EEOC ultimately declined to even review, let along alter, any of the existing sexual harassment guidelines. One explanation is found in the internal papers of the agency: the Commissioners characterized the existing guidance as having political and judicial backing, while despite the opportunity few opponents appeared to publicly complain.[22] The decision to back away from changing the regulations meant that the official legal position of the United States, and the Reagan Administration's EEOC, was to follow the framework of Holmes-Norton's legal analysis and defend it in court.

Thus, when the Supreme Court finally addressed the issue in 1986, conservatives faced significant obstacles to a favorable ruling. Although the United States appeared an an *amicus curiae* in support of the defense, the Reagan Administration could not argue directly against the position taken by the EEOC guidelines. Uniform appellate court decisions provided no cover. Indeed, the sole issue was one of application, with the Supreme Court declining to adopt the Chamber's position on the scope of employer defenses, validating all the elements of hostile work environment claims, and ruling unanimously in favor of the plaintiff.

However, this ruling was a turning point of sorts for a more conservative view of sexual harassment law. While it enshrined the radical feminist viewpoint of MacKinnon into law, it also opened the door to a fact-based debate over when and how employers should be held liable. Following *Meritor*, appellate rulings turned to the question of the scope of potential defenses, when and how employer liability applied, and validating summary judgment decisions for defendants in the lower courts. It was also a turning point for business community opponents, who finally appeared to participate in litigation and engage the issues. And as more conservative judges took the federal appellate bench in greater numbers, defendants prevailed more frequently and succeeded in bringing about greater doctrinal retrenchment.[23]

Nevertheless, in a relatively brief appellate litigation campaign activists successfully defined workplace sexual harassment as illegal sex discrimination, despite a series of potential political obstacles. Considering the relative resiliance of this liberal legal expansion over the 1981 – 1991 timeframe requires a more complex model than simply applying national political

---

[20] *See infra* Chapter 3.

[21] *See* Baker, *supra* note 12; *infra* Chapter 3.

[22] *See infra* Chapter 3 for a description and analysis of these internal memoranda.

[23] *See infra* Chapters 3 and 4.

trends or judicial ideology. In particular, looking at the role of the parties to litigation – especially those who were social movement organizations or working through larger advocacy networks -- expands the universe of relevant political actors. Thus the first step in undertaking this study is to look at what existing theory suggests as relevant components of the analytic framework.

SITUATING THIS PROJECT IN THE EXISTING LITERATURE

In looking to explain the emergence, expansion and development of sexual harassment as a legal doctrine, there are two distinct yet conceptually overlapping disciplinary frameworks to draw upon. The first comes from public law political science -- and in particular models that seek to explain law as a product of or an interaction with ideological or partisan political forces. The second is grounded in more sociological approaches to law – work on claims mobilization, the use of law to produce social change, and the role of networks as conduits for legal institutionalization. Neither of these standing alone provides a satisfactory theory to apply to this case. However, drawing upon both traditions generates new theoretical insights and a broader array of potential explanatory variables to use in this project.

Prior work on how sexual harassment emerged as a legal concept have offered explanations that fail to engage the complex political dynamics involved in the emergence and defense of this claim. The conventional approach in much of the legal literature is to focus on Catherine MacKinnon's important scholarly contributions (and her personal relationship to one of the early appellate judges).[24] Empirical works have considered the nature of American business and legal culture but tend to gloss over the question of why the claim emerged and proved especially resilient over this critical time period.[25] An important study of early sexual harassment plaintiffs illuminates the role of everyday lawyering in this story of social change,[26] but does not address the subsequent organization and network that enabled their contributions to have a more lasting effect. This project fills those gaps by looking to judicial politics in the context of sociolegal findings about law, litigants and legal institutions.

In judicial politics terms, the creation and rapid diffusion of sexual harassment law in the United States is a seemingly anamolous case. Neither the partisan identification of judges, nor the policy agenda of the White House, Congress or federal agencies, appears to fully explain this outcome. Much of the empirical work in the judicial politics literature has focused either on the "attitudinal" model of ideologically-based judging,[27] or on a "strategic" model. The

---

[24] Augustus B. Cochran III, SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE (2004); Baker, *supra* note 12.

[25] Kathrin S. Zippel, THE POLITICS OF SEXUAL HARASSMENT: A COMPARATIVE STUDY OF THE UNITED STATES, THE EUROPEAN UNION, AND GERMANY (2006); Abigail C. Saguy, WHAT IS SEXUAL HARASSMENT? FROM CAPITOL HILL TO THE SORBONNE (2003).

[26] *See* Marshall*, supra* note 12.

[27] Andrew D. Martin, Kevin M. Quinn, et al., *Competing Approaches to Predicting Supreme Court*

strategic model incorporates the preferences of political actors in other branches of government, or of other judges in superior or collegial decision structures.[28] This often intense debate on whether judges are autonomous policymakers or responsive to a larger political context usually fails to incorporate the preferences or decisions of parties to litigation.

The most obvious popular explanations for the success of the sexual harassment litigation campaign would be the earlier development of favorable legal doctrine, or the work of feminist lawyers and activists. However, well-regarded studies have challenged the popular "myth" that a classic social-movement instigated impact litigation campaign, largely confined to precedent-setting litigation, can successfully achieve broad social change.[29] This work may have further marginalized the study of litigants and lawyers. Indeed, the very role of litigants as political actors, and their ability to exert influence through law, remains significantly under-theorized in public law.[30]

This failure of many courts and politics scholars to account for the role of litigants is important, because parties to litigation largely set the agenda of American courts. Litigant choices determine when, where and how particular issues come before courts for decision. Through these choices, litigants have an opportunity to reinforce, mediate or disrupt ideologically-driven judging. In American courts, private litigants play a potentially crucial role in judicial policymaking. Yet with a few noteworthy exceptions, this political role remains largely unexamined. [31]

Decisionmaking, 2 PERSPECTIVES ON POLITICS 761 (2004); Cass R. Sunstein, David Schadke, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation,* 90 VIRGINIA LAW REVIEW 301 (2004); Jeffrey A. Segal and Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); Harold J. Spaeth and Jeffrey A. Segal, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999); Orly Ashenfelter, Theodore Eisenberg and Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 THE JOURNAL OF LEGAL STUDIES 257 (1995).

[28] Ran Hirschl, TOWARDS JURISTOCRACY (2004); Cambridge, MA, Cambridge University Press; Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); Lee Epstein, Jack Knight,Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOCIETY REVIEW 117 (2001); Forrest Maltzman, James F. Spriggs, Paul J. Wahlbeck, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); Donald R. Songer, Jeffrey A. Segal, Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AMERICAN JOURNAL OF POLITICAL SCIENCE 673 (1994); Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policymaker*, 6 JOURNAL OF PUBLIC LAW 267 (1957).

[29] Stuart Scheingold, THE POLITICS OF RIGHTS (1974); Rosenberg, *supra* note 2.

[30] Schlanger, *supra* note 3.

[31] Epp, *supra* note 1; Lee Epstein and Joseph F. Kobylka, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992); Frances F. Zemans, Legal Mobilization: The Neglected

This project is a direct response to the dearth of empirical and theoretical treatment of judicial litigants in public law scholarship. For assistance, I turn to several socio-legal literatures, which have more explicitly considered whether lawyers and parties act as agents of transformation through law.

Sociolegal scholarship on claims mobilization addresses how individuals and their counsel attempt to turn formal legal entitlements into meaningful remedies. A number of important empirical studies identify barriers to successful mobilization.[32] Studies of cause lawyering offer a direct perspective on the lawyers and a more indirect perspective on the movements and organizations that have explicitly sought to use law as a tool of social and cultural change or political reform.[33] However, this literature does not typically engage the political context of litigation or address the effect of political opposition or alignment between advocates and decisionmakers. One important contribution of this literature, nevertheless, is its rich conception of legal mobilization and "law" as constituted through social interactions that may remain entirely outside the formal legal system. Further, sociolegal scholars have demonstrated how law serves as a resource to individuals resisting subordination.[34]

The sociology of law and organizations offers a different perspective on the role of law and lawyers. This scholarship considers lawyers as conduits of normative isomorphism, theorizing that professionalized legal networks act to construct the meaning of law outside courts, and then through litigation turn those meanings into legal reality.[35] Sociolegal work has explicitly considered how litigation parties act as key agenda-setters.[36] The organizational sociology perspective on law has intriguing potential application to the scenario of social movement organizations and their lawyers, working in coalition to change prevailing legal rules. But while scholars have begun to apply organization theory to the study of movements as organizations,[37] too little has been said in these works about law and lawyers to date.

Role of the law in the Political System, 77 AMERICAN POLITICAL SCIENCE REVIEW 690 (1983).

[32] Albiston, *supra* note 7; Laura Beth Neilsen, and Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WISCONSIN LAW REVIEW 663 (2005); Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies,* 39 LAW & SOCIETY REVIEW 123 (2005).

[33] Hilbink, *supra* note 4; John P. Heinz, Ann Southworth, and Anthony Paik, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOCIETY REVIEW 50 (2003); Austin Sarat and Stuart Scheingold, eds., CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (1998) ("POLITICAL COMMITMENTS").

[34] Albiston, *supra* note 7. McCann, *supra* note 1.

[35] Edelman, *supra* note 6; Bisom-Rapp, *supra* note 6.

[36] Marshall, *supra* note 12; Bisom-Rapp, *supra* note 6.

[37] Gerald F. Davis, et al, eds., SOCIAL MOVEMENTS AND ORGANIZATION THEORY (2005).

Finally, the limited work applying social movement theory to law provides a third potential explanatory lens – focused on the political opportunity structure, framing strategies, and organizational resources affecting movement-driven litigation. Doug McAdam's groundbreaking work on the American civil rights movement pioneered the study of what he named the "political opportunity structure" within which movements emerge and act.[38] This contextual analysis typically considers a variety of political and economic variables that may be relevant to social movement activity. A number of prominent works address social movement framing – the strategic deployment of selective symbols and discourse -- as a way to understand how movements build support to challenge dominant political institutions.[39] Finally, there is substantial empirical research on social movement organizations themselves, including the role of organizational fields,[40] and networks,[41] and the potential tension between radical grassroots organizational forms and approaches and more mainstream and professionalized ones.[42]

I further expand the theoretical framework through what Keith Whittington terms "post-behavioralist" public law scholarship.[43] This literature, frequently grounded in a historical institutionalist perspective, takes more seriously the political significance of law and lawyering. These approaches view courts as embedded in a larger political structure, and model their decisions as products of uniquely judicial norms or role orientation, although their conclusions about the relative power of courts may vary.[44] Most significantly for this project, these scholars engage with courts not simply as partisan actors but as embedded in a set of overarching cultural practices and particularized organizational structures that mediate politics through law.

---

[38] McAdam, *supra* note 5.

[39] Pedriana, *supra* note 4; David A. Snow, *Framing Processes, Ideology, and Discursive Fields, in* David A. Snow, et al, eds., THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 380 (2004); Feree, *supra* note 4.

[40] Edelman, et al, *supra* note 7; Raka Ray, FIELDS OF PROTEST: WOMENS' MOVEMENTS IN INDIA (1999).

[41] Mario Diani and Doug McAdam, eds., SOCIAL MOVEMENTS AND NETWORKS: RELATIONAL APPROACHES TO COLLECTIVE ACTION (2003).

[42] Feree, *supra* note 4; Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AMERICAN SOCIOLOGICAL REVIEW 585 (1988).

[43] Keith Whittington, *Once More Into the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOCIAL INQUIRY 601 (2000).

[44] Paul Frymer, BLACK AND BLUE: AFRICAN-AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2007); Martin Shapiro and Alex Stone Sweet, ON LAW, POLITICS, AND JUDICIALIZATION (2002); Malcolm Feeley and Ed Rubin, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998); Lee Epstein and Jack Knight, *The Norm of Stare Decisis,* 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 1018 (1996).

One open question in public law research on judicial politics is the relative force of law in constraining ideological judging. Although we know that ideology predicts the outcome of Supreme Court rulings, with liberal and conservative judges following their policy preferences in making decisions,[45] studies of appellate courts generate more mixed results, with some studies finding an effect of ideology,[46] and others concluding that courts follow legal norms instead of political attitudes.[47] Still other empirical studies conclude that both political and legal factors explain case outcomes.[48] As Lee Epstein and Jack Knight explain in a recent review essay, all three of these conclusions have both logical and empirical support.[49] An emerging literature applying network analysis to the study of legal citations at the Supreme Court level is another way public law is beginning to take account of the role of law and legal norms – a methodology I draw on explicitly in this project.[50]

A key contribution of the "post-behavioralists" is modeling courts to take account of the interactions between politics and law. As Whittington explains, this perspective allows public law scholarship to "bring the law back in."[51] Indeed, a number of works support the view that ignoring law and legal norms leads to substantial misunderstanding of the politics of the judicial enterprise.[52] Further, it may be the unique way courts do politics – mediated through a particular institutional framework -- that gives courts their power to enact sweeping institutional reforms.[53]

---

[45] Martin, et al., Segal and Spaeth, Spaeth and Segal, *supra* note 27.

[46] Songer et al, *supra* note 28; Sunstein et al, *supra* note 27.

[47] Ashenfelter, et al, *supra* note 27; Lawrence Baum, *Specialization and Authority Acceptance: The Supreme Court and Lower Federal Courts*, 47 POLITICAL RESEARCH QUARTERLY 693 (1994).

[48] Tiller and Cross, *supra* note 8; Stephanie A. Lindquist and Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. LAW REVIEW 1156 (2005); Frank B. Cross, *Decisionmaking in U.S. Courts of Appeal*, 91 CALIFORNIA LAW REVIEW 1457 (2003); Songer, et al, *supra* note 27; Donald R. Songer and Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AMERICAN JOURNAL OF POLITICAL SCIENCE 963 (1992).

[49] Epstein and Knight, *supra* note 8.

[50] Cross, et al, *Citations in the U.S. Supreme Court: An Empirical Analysis of Their Use and Significance,* 2010 UNIV. OF ILLINOIS LAW REVIEW 489 (2010); James H. Fowler, et al, *Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents,* 15 POITICAL ANALYSIS 324 (2007).

[51] Whittington, *supra* note 43.

[52] Shapiro and Stone Sweet, Feeley and Rubin, Epstein and Knight, *supra* note 44; McCann, *supra* note 1.

[53] *Id. See also* Frymer *supra* note 44.

Nevertheless, even here, little work addresses how parties – particularly organized citizen activists - act as agenda-setters or mediate court politics by mobilizing claims.[54] Paul Frymer's study of how courts had the power to successfully tackle race discrimination in labor unions does explicitly include lawyers and litigants as one of the relevant institutional factors that increased the power of courts to effect change.[55] Two other interesting exceptions are Charles Epp's comparative study of strategic litigation in constitutional courts, and Epstein and Kobylka's 1992 study of Warren Court-era cause lawerying. With respect to the U.S. case, Epp concludes that a growth in resources enabled liberal social movements to mobilize courts and enact their desired policy.[56] In particular, he contends that mobilization has an effect independent of judicial ideology, showing that litigation gains were not always contemporaneous with politically favorable courts. Similarly, Epstein and Kobylka reveal how legal argument and litigation tactics interacted with judicial politics to produce landmark Supreme Court rulings.[57] Sean Farhang's study of the role of private litigation in the development of civil rights policy in the United States is a recent work addressing litigants as political actors, in particular their effect on other political institutions including Congress.[58]

My work on this project finds particular inspiration from these studies. In expanding on Epp's analysis I consider not only the proponents of change, but their resoures, engagement and organization relative to litgation opponents. This project goes beyond Epstein and Kobylka's work by explicitly using social movement theory to understand both tactical litigant choices and the larger political structures affecting litigation outcomes. Finally I build on the insight of Frymer and others that the institutional context of litigation matters by asking how it shaped the agency of the litigants in these cases.

Taken together, these literatures identify mobilization as worthy of study and also reveal open theoretical and empirical issues in the social movements, sociolegal and public law literatures this study addresses.

RESEARCH QUESTIONS AND METHODOLOGY

In considering the relative importance of law, politics, and mobilization in the establishment and development of this new rights claim, I focus in particular on the role of litigants as important political actors in the American judicial system. This study utilizes historical research and quantitative and qualitative analysis of legal decisions to address the following questions:

---

[54] Schlanger, *supra* note 3.

[55] Frymer *supra* note 44.

[56] Epp, *supra* note 1.

[57] Epstein and Kobylka, *supra* note 31.

[58] Sean Farhang, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES (2010).

- How did this new rights claim emerge? To what extent do existing models of law and social change account for its initial development? (Chapter 2)
- How did a changing political opportunity structure affect the trajectory of this claim? (Chapter 3)
- How does this case illuminate current public law debates over the relationship between legal norms and judicial politics? (Chapter 4)

My core empirical enterprise is a multi-method study of federal court litigation of sexual harassment claims from 1971 through 1991. I utilize historical material on the development of sexual harassment litigation, the role of women's movement activists and organizations, and the role of relevant political actors over this period, mainly through secondary source research on the women's movement generally, activism addressing sexual harassment specifically, and the Reagan-era response to civil rights. In addition I have developed a database of relevant federal court decisions, [59] collecting, reviewing, and coding the entire universe of federal lower court cases on sexual harassment through 1980 available in electronic form, and the entire universe of appeals court cases on sexual harassment through 1991 available in electronic form.[60] (*See* Appendix 1, Court of Appeals Cases and Appendix 2, District Court Cases). My coding for each case includes case-specific characteristics (court, year, facts, holding, judge, parties) and, for the appellate cases, also includes citation link coding that tracks whether and how each case is linked to others through citation. A full chart of the variables used in the analysis is attached as Appendix 3, and Chapter Four describes the databases I created for this project in more detail.[61] Third I have collected and reviewed original/archival source data on the EEOC from 1971 to 1991, including internal and external agency reports, charge filing summary data, and the records of the original rulemaking on the 1980 Sexual Harassment Guidelines, as well as the legislative and regulatory challenge/review of those guidelines in 1981-1982. That primary source material is used in Chapters 2 and 3.

Based on prior work in public law and sociolegal studies, I consider a model of mobilization effectiveness for rights-based movements operating through law in a hostile political climate. This model posits litigation success for sexual harassment plaintiffs as a function of the relative hostility of the general political environment, the relative favorability of existing law, the relative hostility of the particular judicial forum, and the effect of litigant mobilization (especially differences in resources, tactics and networks). (Fig. 1, below). The

---

[59] During the time period of the study, the vast majority of sexual harassment litigation appears to have occurred in federal as opposed to state courts. The early history of sexual harassment litigation indicates a dominant focus by activists on federal courts, federal remedies and the U.S. EEOC.

[60] I use the Westlaw and Lexis legal databases, which include all published and some unpublished cases during the relevant time period.

[61] Selection issues raised by the reliance on appellate court opinions are addressed in more detail in Chapter 4.

study considers each of them in some depth in the qualititative chapters and then incorporates them to the extent possible into the final quantitative analysis.

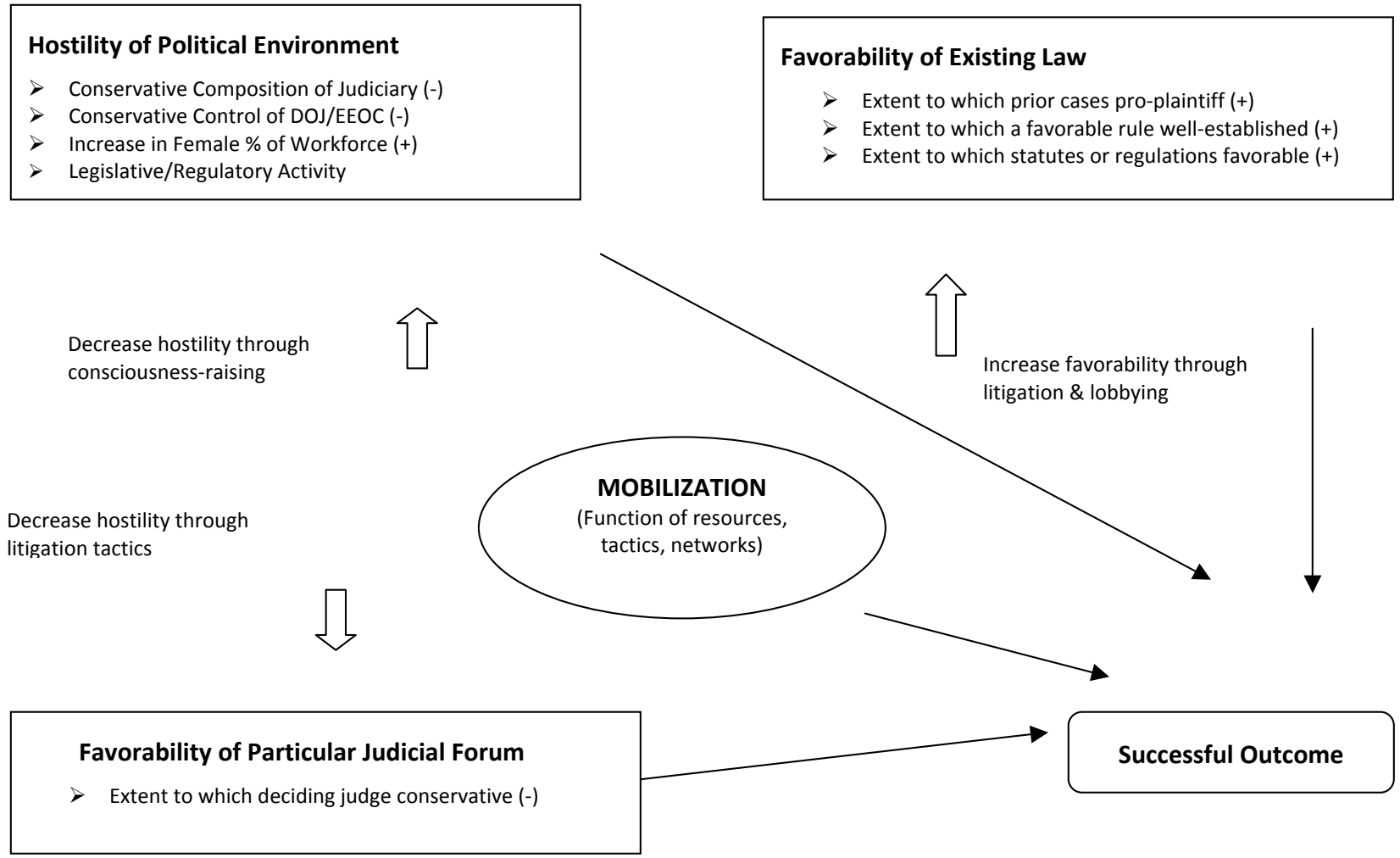
It is important to bear in mind that neither politics nor law is exogenous to claims mobilization.[62] Parties seeking change through litigation can alter the hostility of the political environment through choices ranging from forum shopping to consciousness-raising to calibration of tactics and framing. Law is a resource parties can generate, both because they can attempt to "play for rules" to benefit them in the future,[63] and because litigation parties play a role in identifying and defining the applicable law in the case. While it is thus not possible to empirically isolate any of these effects, each of them has its own set of theoretically-based expectations to take into account as explained further below.

[62] Edelman, et al, *supra* note 7.

[63] Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 95 LAW & SOCIETY REVIEW 95 (1974).

Figure 1 Proposed Model

Likelihood of Success = F (Hostility of Political Environment, Favorability of Existing Law, Hostility of the Particular Forum, Effectiveness of Mobilization)



To address these questions, I look to measures of the major factors of interest: the politics of the judicial forum, the political opportunity structure, and the effect of existing law. Then I consider how the presence of mobilization may change the effect or nature of these factors and influence the ultimate outcome.

A. Assessing the hostility of the particular judicial forum. It is well-established that the ideological preferences of deciding judges are a significant predictor of case outcome. Thus, I will use the accepted approaches in political science to scoring federal judges on a liberal to conservative continuum as one of the variables that may explain litigation outcomes. I assume that *ceteres paribus,* more conservative judges will rule against plaintiffs in sexual harassment cases. These scores permit me to assess the political hostility of the relevant judicial forums, and determine the extent to which litigants in these cases succeeded or failed before political allies vs. antagonists. I will use the Giles/Hettinger/Pepper method of scoring federal appellate judges[64] to generate a measurement of judicial ideology for each case in the quantitative study.

B. Political Opportunity Structure. Although in prior studies, the politics of the judicial forum has a strong explanatory power, in most cases this variable leaves a great deal of unexplained variation on the table. And strategic and historical institutionalist approaches in public law explicitly consider the larger political context within which individual courts or judges rule. I draw on the concept of political opportunity structure from the social movements literature, because it provides a theoretical model of politics as a complex, multi-factor environment, rather than simply the partisan identification of a few key political actors. By considering the changing ideological identification of the courts over time, changes in the political composition of the civil rights enforcement agencies, and relevant legislative and regulatory activity, I can better understand the scope of forces contributing to and counterbalancing the rise of conservative politics. In addition, the economic changes wrought by the increasingly female composition of the workforce are part of the political opportunity structure within which mobilization occurs. Although it is not really possible to formally test the effect of the political environment, because operationalizing and measuring all the elements of that environment is too difficult, I take it into account to the extent practicable.

C. Modeling the effect of Existing Law. The longstanding public law debate about the effect of law on judicial politics also involves a struggle to effectively model and empirically test the role of law as a constraint. Having tried various formal approaches to modeling and quantifying law, I rely on three sets of indirect measures of the effect of law.[65] The first utilizes network measures and citation patterns to study whether legal norms of relying on leading cases are independent from larger political considerations. The second is based on comparing the effect of ideology before and after the key legal issues became settled. The third considers the relative success of claims and defenses over time.

---

[64] Micheal W. Giles, Virginia A. Hettinger, and Todd C. Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POLITICAL RESEARCH QUARTERLY 623 (2001).

[65] The model of law is set forth in more detail in Chapter 4.

D. The Effect of Mobilization on these Variables. In addition to setting forth my expectations about how these factors might affect success, I also consider how mobilization itself can increase or decrease the salience and strength of these factors. I expect that organized litigation parties can increase the likelihood of success in a hostile political environment in the following ways:

- Mobilization increases the likelihood of success where it decreases the hostility of the forum (through the strategic deployment of litigation tactics).
- Mobilization increases the likelihood of success where it increases the favorability of existing law (either through winning prior cases or by influencing the development of favorable statutes or regulations – or blocking unfavorable ones).
- Mobilization increases the likelihood of success where it decreases the hostility of the overall political environment (through public consciousness-raising and social change).

In my case, these effects are observed indirectly, largely by comparing the level and timing of mobilization of proponents and opponents with regard to key legal and regulatory developments.

SUMMARY OF THE CHAPTERS THAT FOLLOW

In Chapter 2, I begin the story by tracing the origins of the legal claim of sexual harassment. In particular, I consider the importance of litigation parties to placing this issue on the judicial agenda, to constructing the problem of sexual harassment as a civil rights claim, and to seeking an interpretation of existing law to cover it. I also look at the different roles played by individual, organizations and governmental litigants, each of which was both important and distinct. Data for this chapter primarily comes from a review and coding of the early cases in District Court, secondary sources, and the EEOC archives.

In Chapter 3, I look at the political environment, and in particular the national level change from liberal to conservative politics. I assess evidence of potential hostility to a new, feminist civil rights claim from Administration officials who placed new limits on government enforcement of anti-discrimination law and from more conservative judicial appointments. I also consider contrary trends, including success in other areas of sex discrimination law and economic changes toward a more female dominated workforce. I specifically compare the activities of the primary proponent organizations, such as women's rights and labor groups, with the primary opponent organizations such as the Chamber of Commerce. With multiple arenas of contention available – before the federal courts, Congress and the U.S. EEOC, proponents displayed a much higher and more visible level of engagement. Data in this chapter comes primarily from secondary sources, legislative materials, and the EEOC archives.

In Chapter 4, I apply quantitative analysis to explore certain issues related to law, politics and organizational effectiveness more formally. I test measures of judicial ideology, organizational activity, case specific factors and potential measures of law over time. One set of results is based on the same type of logit regression model common in other studies of judicial politics. The second uses the emerging approach of treating law as a network of

citations. The quantitative analysis suggests that the work of proponents in seeking and defending legal rules paid off, as even conservative judges deferred to what quickly became a settled issue. However, it also suggests that especially after 1986, conservative politics limited the success of plaintiffs in disputes over the application and limitations of the new right. Data from this chapter comes from original coding of federal appellate cases and from existing databases of judicial background and ideological coding.

In Chapter 5, I consider what conclusions can be drawn from this case for larger theoretical questions and future empirical tests. In particular I focus on three issues of potential importance: (1) the role of individual litigation in setting agendas both for courts and for social movement organizations; (2) the expansion of theories about legal resources and litigation success to incorporate the resources and tactical choices of opponents and (3) the interaction between legal norms and structures and underlying political trends to create a shifting terrain of constraint and amplification. I place these questions in the context of applying a more sociolegal framework to existing public law debates.

CHAPTER 2: FROM MACKINNON TO *MERITOR*:

GRASSROOTS LITIGANTS AND LAWYERS BUILD TO AN ORGANIZED FEMINIST MOBILIZATION (1971-1986)

Abstract: This chapter asks how this new rights claim emerged, and to what extent existing models of law and social change account for its initial development. An analysis of the early sexual harassment litigants, and the lawyers and organizations who supported them, reveals that individual semi-spontaneous claims filing predated organized social movement litigation in this area, and fueled the development of a larger network of activists and lawyers. Thus, rather than a conventional and strategic impact litigation campaign, these cases evolved from a broader grassroots uprising. The early legal pioneers were a loosely networked set of individuals and grassroots organizations, proceeding organically and somewhat out of public view with limited involvement from major women's groups or prominent feminist movement leaders. Over time, this fledgling structure evolved into a much more robust organized framework where organizational activists affirmatively sought to "play for rules" – organization that would prove critical as the political environment became more conservative. Proponents also benefitted from legal resources developed in earlier efforts to fight race discrimination. Data in this chapter come from secondary historical sources, other prior studies, and a review and coding of federal cases.

INTRODUCTION

"This is a controversy underpinned by the subtleties of an inharmonious personal relationship"
-- *Barnes v. Train* (1974)

"This Court determined that the record revealed proof suggestive of discrimination on the basis of sex"
-- *Williams v. Saxbe* (1976)

Between 1971 and 1980, one of the most significant judicial innovations of second-wave feminism quietly took hold. In approximately two dozen known rulings over less than a decade, federal courts moved from deeply divided over the potential legal remedies for sexual harassment in the workplace, to virtually unified in concluding this conduct violated Title VII. In the six years that followed this early litigation period, the issue would reach and be finally positively resolved by the U.S. Supreme Court. No formal strategic litigation campaign generated this result. Instead, small-scale, localized grassroots activism, everyday lawyering, and access to movement resources combined to place the issue on the agenda and secure favorable decisions. Over time, the case-by-case process of lawyers representing clients, and

together re-defining their injuries as discrimination under the law, constituted a legal theory that ultimately would withstand a larger civil rights backlash over the next decade.

Before feminist advocates pioneered the term "sexual harassment" and before law clearly established this conduct as a civil rights violation, plaintiffs began to engage the legal system to help them.[66] They sought representation anywhere they could find it -- in the process creating a new cause of action, a new social cause, and the beginnings of a recognized bar. The role of individual claimants as catalysts of a new legal theory, in the absence of a strategic litigation campaign or much of a movement structure, raises new questions for the study of social movements and law. This eclectic, organic, bottom-up legal movement generates a more constituitive understanding of how case-by-case litigation and social activism can interact to produce change.

Two other types of litigants built on the work of these early plaintiffs and lawyers to solidify the legal right to be free from sexual harassment at work. Organized women's rights and civil rights organizations and feminist activists stepped in to support key cases, and established a robust network to promote and defend the application of Title VII to sexual harassment. They took the opportunity presented by private litigants to develop a broader campaign that engaged in multiple legal and political arenas. In addition, the U.S. Equal Employment Opportunity Commission brought the authority of government to bear on the problem. Both individual catalysts and evolving organization were required for this legal change.

Ultimately these different categories of litigants collectively established a new legal rule. In the case of the individuals, their personal experiences of injury and discrimination could not be advanced without an argument for legal expansion. In the case of the organizations and the government litigants, they explicitly sought to establish favorable rulings that would extend to future cases, and they provided critical resources to the fight. Although Galanter theorizes that "playing for rules" is the province of the most resource-advantaged parties,[67] in this case, legal rules served as a way to leverage power on behalf of female employees against their employers. As will be seen in Chapters 3 and 4, the affirmative pursuit of legal rules established critical anchors against later political change.

This case represents a challenge to models of social change through law contingent on pre-existing formal organizational structure, even as it validates the relevance of organizational support and resources. Because social movements in the United States have frequently used courts to challenge inequality, a lively scholarly debate has focused on the proper role of litigation in the activist toolkit and the effect of litigation strategies on movement organizations.[68] A number of scholars have analyzed the relationship between law reform

---

[66] Marshall, *supra* note 12.

[67] Galanter, *supra* note 63.

[68] Michael J. Klarman FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Epp, *supra* note 1; McCann, *supra* note 1; Rosenberg, *supra* note 2;

strategies and more professionalized organizations, the extent to which movement lawyers divert grassroots goals into elite strategies, and the limits of litigation as an engine of social change. Yet the American system of litigation permits individuals to challenge the status quo politically without a movement infrastructure.[69] Thus, the empirical debates about whether social movements should choose law are necessarily limited – individuals may choose law, forcing organizations and activists to respond.

Further, litigation itself is more than a tool of social change. It is also a constituitive process that can construct a larger cause or movement over time. Beginning in the early 1970's, women and their lawyers began filing cases challenging sexual advances, language and behavior in the workplace as sex discrimination. Before social movement organizations formally took up the issue of sexual harassment, before feminist scholars like Catherine MacKinnon began laying out a theory of sexual harassment as gendered oppression,[70] before any court or agency or legislature had determined that Title VII's ban on sex-based discrimination covered workplace propositions, individual lawyers and litigants began making claims. By the end of the decade, both a legal theory and a loose network of individuals and organizations sharing a more explicit social change goal emerged.

To place this aspect of the case in the context of established theoretical and empircal work on law and social change requires considering multiple strands of sociolegal and public law scholarship. The first is the work on social movements. The second is the literature on cause lawyering and claims mobilization. The third is the more limited study of plaintiffs and litigants as political actors and activists. This case builds on this previous work to ask a new set of questions about how issues may come to be on the legal agenda and what options there are for social change organizations to engage with law.

SOCIAL MOVEMENTS AND LEGAL CHANGE

Social movement scholarship has a limited engagement with law and legal tactics.[71] Some studies address the role of law in general, or litigation in particular, yet often challenge whether lawyers as members of the elite can successfully challenge the state. Other studies have taken up the question of whether law is an effective tool of social change, or whether professionalism of tactics and strategies dilutes a movement's activism or substitutes legal for political goals. However all the theoretical models presuppose an existing movement or organization choosing from among an array of tactical options with various pros and cons.

Malcolm M. Feeley, *Hollow Hopes, Flypaper and Other Metaphors,* 17 LAW AND SOCIAL INQUIRY 745 (1992); Stephen Barkan, *Legal Control of the Southern Civil Rights Movement,* 49 AMERICAN SOCIOLOGICAL REVIEW 552 (1984).

[69] Zemans, *supra* note 31.

[70] MacKinnon, *supra* note 14.

[71] McCann, *supra* note 3.

Doug McAdam's groundbreaking work on the American civil rights movement is an example of work that divides law from movement-based activism. Although McAdam's work clearly considered the role of litigation in the overall changes wrought by the civil rights movement, he also placed law outside the movement. McAdam defined lawyers and legal tactics as an "elite" strategy, juxtaposed with the "contentious politics" of his study.[72] Other scholars have addressed how professionalized organizational forms and approaches (including those that use legal tactics or employ lawyers) are in tension with more grassroots-based activism.[73]

A number of works address the limitations of law – and litigation in particular – as a tool of social change. Stuart Scheingold warned of the "Myth of Rights"[74] while Gerald Rosenberg relied on empirical data to conclude some of the most celebrated civil rights decisions of the 20th century in fact failed to disrupt the status quo[75] and Marc Galanter theorized that in litigation the "'Haves' Come Out Ahead."[76] Although Rosenberg's work has engendered scholarly critique,[77] there is substantial basis for concluding that litigation can be, in Rosenberg's words, a "flypaper" trap for naïve activists.

Other accounts are more favorable toward the role of law. Some research addresses how law can serve as a resource to social movements.[78] In particular, social movement studies have considered law as a source of collective action frames, and a core interpretative process for movements.[79] Law may also serve as an operational environment for movement organizations as they make tactical and representational choices.[80] Finally some scholars have identified particular cases where litigation seemed particularly important or effective in shifting the balance of power toward more marginalized groups.[81]

---

[72] McAdam, *supra* note 5. McAdam's more recent work considers more affirmative possibilities for law. Edelman, Leachman, and McAdam, *supra* note 7.

[73] Feree, *supra* note 4; Staggenborg, *supra* note 42.

[74] Scheingold, *supra* note 29.

[75] Rosenberg, *supra* note 2.

[76] Galanter, *supra* note 63.

[77] These include questions about data, the scope of the research question, and the methodological framework. Feeley, *supra* note 68 ; Jonathan Simon, *"The Long Walk Home" to Politics,* 26 LAW AND SOCIETY REVIEW 923 (1992); Michael McCann, *Casual v. Constituitive Explanations, (or, On the Difficulty of Being So Positive)*, 21 LAW AND SOCIAL INQUIRY 457 (1996).

[78] McCann, *supra* note 1; Staggenborg, *supra* note 42.

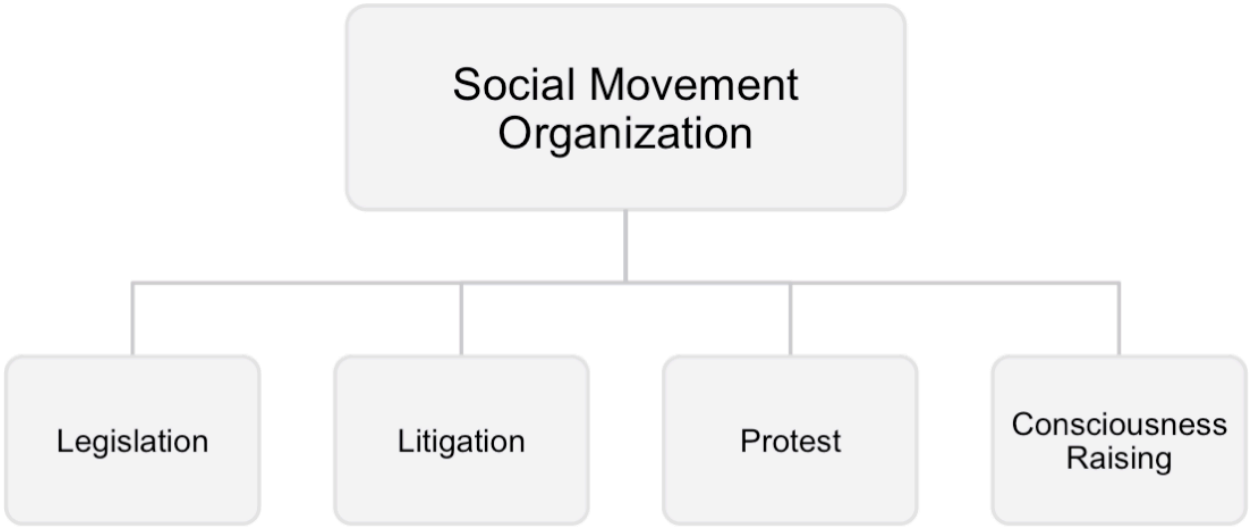
[79] Pedriana, Feree, *supra* note 4; McCann, *supra* note 1.

[80] Edelman, et al, *supra* note 7.

[81] Epp, *supra* note 1; Frymer, *supra* note 44.

Yet the question of whether social movements should choose law assumes that movements and movement organizations fully control the strategic agenda. Much of the empirical literature seems to posit a scenario where existing social movement organizations weigh a series of social change tactics and make knowing choices along the lines of Figure 2.

Figure 2 Model of Social Movement Tactical Choices



To the extent that individuals are free to raise issues in the courts outside the domain of movement activism, they can disrupt or divert the work of organizations in other political arenas. Frances Zemans makes a strong theoretical case that this is a virtue of a system of private litigation.[82] It allows individuals to have a political voice even in the absence of the kind of resources necessary to win a legislative fight or conduct a national mobilization. Regardless, individual pressure on movement organizations through litigation is something that can and does occur, revealing problems with models that vest all strategic agency in movement organizations.

Nevertheless, there is substantial reason to believe that even where individuals serve as catalysts for legal engagement or agenda setters, collective action may make the difference for an issue's ultimate success. Epp's study of rights-based mobilizations concluded that a broad base of organizational support made the difference in gender-based constitutional claims before a conservative Supreme Court.[83] Organized labor was the legal and political force behind the pay equity fights of the 1980's.[84] The classic impact litigation model is that of the American civil rights movement, which involved multiple organizations carrying out a strategy

[82] Zemans, *supra* note 31.

[83] Epp, *supra* note 1.

[84] McCann, *supra* note 1.

over decades.[85] Each of these other historical examples featured significant formal organizational support, suggesting that individual litigation alone is unlikely to lead to broad-scale change.

CAUSE LAWYERING AND CLAIMS MOBILIZATION

To fill some of the gaps in a purely organizational or social-movement perspective, I also consider the findings of a literature that focuses on litigants and lawyers specifically. Law and society scholars have long considered the importance of private litigation and individual legal actors as worthy of study. Two areas in particular – cause lawyering and claims mobilization – have potential application to this case. This is particularly true if one looks beyond a purely dispute-centered perspective to consider how individual claims making can build to a more robust organizational agenda.

Despite the absence of any existing legal framework governing sexual harassment, women experiencing problems at work turned to lawyers for help.[86] They partnered with literally anyone they could find to represent them. A loosely networked and eclectic mix of early feminists, civil rights lawyers, garden-variety litigators, and academics formed the origins of the sexual harassment bar. Over the years, these plaintiffs and their lawyers, along with a growing community of activists, scholars, and bureaucrats, constructed their cause through sustained interaction with the legal system.

Because of the prominence of individuals in this early history, the cause lawyering literature, which focuses attention on the role of litigants and legal professionals, provides particularly useful theoretical insights.[87] Ultimately, defining sexual harassment as a violation of Title VII's ban on workplace sex discrimination came about much more through the process of everyday lawyering than through any strategic, social movement-driven campaign. The work of the eclectic array of legal professionals who engaged in this law reform is frequently (but not always) recognizable as "cause lawyering. Notably, in this case these "cause lawyers" effectively pre-dated their cause. The term "cause lawyer" suggests the marriage of an existing and identifiable cause with a specified set of legal gladiators – who then take up that cause and proceed to fight for it in and out of court. Although in this case, no real "cause" yet existed, this literature provides a useful theoretical framework for interpreting the evolution of this claim.

Sociolegal scholars have paid significant attention to the role lawyers play in large-scale mobilization for social change and generated a rich empirical literature. Most legal work revolves around private commercial arrangements for representation. By contrast, "cause lawyering" involves lawyers in the service of activism. The cause lawyering literature considers how individual lawyers understand their professional representation as a politicized act, as well as their role in carrying out a specified social change agenda. Although in theory a "cause

---

[85] Klarman, *supra* note 68.

[86] Baker, Marshall, *supra* note 12.

[87] Hilbink, *supra* note 4; Sarat and Scheingold, POLITICAL COMMITMENTS, *supra* note 33.

lawyer" could be any legal professional whose work carries out a normative vision of serving the public good, much existing empirical work focuses on cause lawyering in support of an identifiable and shared cause or common attribute.

In a series of volumes, Austin Sarat and Stuart Scheingold trace the concept of cause lawyering through a variety of national, cultural and historical contexts.[88] They conclude that cause lawyering comes in many forms – "a protean and heterogeneous enterprise that continues to reinvent itself in confrontations with a vast array of challenges."[89] While resisting a one-size-fits all definition of cause lawyering, they focus on the explicitly politicized and morally-grounded aspects of the lawyer's role. Understanding cause lawyering as a form of professionalized resistance to the status quo, they differentiate it from mere public service or pro bono representation.

Recognizing the diverse roles and approaches lawyers take in this body of empirical work, Thomas Hilbink has derived a "typology" of cause lawyering.[90] He finds three different ideal types -- "proceduralist," "elite/vanguard," and "grassroots. Proceduralist lawyers act out of a core notion of professional responsibility, where representation of social marginalized clients or issues can force the state to live up to its rule of law commitments. Elite/vanguard lawyers "treat law as a superior form of politics," where a lawyer serves as "leader and hero, as social engineer and independent spirit."[91] Grassroots lawyers view law as one tool among many in an activist's toolkit, and reject the inherent superiority or fairness of the legal system. Even outside Hilbink's typology, a continuum of elite to grassroots advocates plays out in the existing studies.

In the conventional understanding of how lawyers pursue social change, the elite model operates. Here the lawyering is top-down, strategic, highly networked, and explicitly aligned with a specified cause. Examples include large firm pro bono work in death penalty cases[92] or impact litigation by non-profit legal organizations on a host of rights-based issues.[93] Whether Thurgood Marshall, Ruth Bader Ginsberg, or some other noted legal pioneer plays the heroic

---

[88] Austin Sarat and Stuart Scheingold, CAUSE LAWYERS AND SOCIAL MOVEMENTS (2006); CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (2001) ("CAUSE LAWYERING AND THE STATE"); POLITICAL COMMITMENTS, *supra* note 33.

[89] Sarat and Scheingold, POLITICAL COMMITMENTS, *supra* note 33, at 5.

[90] Hilbink, *supra* note 4.

[91] *Id.* at 673.

[92] Austin Sarat, *State Transformation and the Struggle for Symbolic Capital, in* CAUSE LAWYERING AND THE STATE, *supra* note 88.

[93] Epp, *supra* note 1; Klarman, *supra* note 68.

role, these lawyers have not only a just cause, but a clear vision and a high level of discipline that maximizes their effectiveness.[94]

Unsuprisingly, many sociolegal scholars have favored something closer to an everyday lawyering model of social change - bottom-up, organic, loosely networked and more constituitive.[95] In a number of these examples, individual client representation provides the basis for significant challenge to the status quo. Shamir and Chinsky's study of lawyers representing Bedouins in Israeli courts is a particularly apt example. As they explain:

> we suggest that lawyers for a cause are not necessarily those who consciously and deliberately orient their professional lives toward promoting that cause. It is in the course of engaging in various professional practices that the possibility of becoming or functioning as a lawyer for a cause is realized.[96]

This conceptualization is a good fit with the case of early sexual harassment law and lawyers.

PLAINTIFFS AS POLITICAL ACTORS

As the cause lawyering literature suggests, private litigation has a public component and is not merely a transactional activity. Many scholars working within and outside the cause lawyering literature have identified cases of social change activism through law. Charles Epp views legal resources as critical to the "rights revolutions" in the United States and other nations,[97] while Michael McCann analyzed litigation and rights frames as tools of resistance for

---

[94] Whether elite or grassroots, cause lawyers are still lawyers. While this literature departs from the assumption of attorneys as neutral, professionalized, zealous advocates for whichever client is paying the bills, it can resemble legal work for hire. Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States, in* POLITICAL COMMITMENTS, *supra* note 33; Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering, in* CAUSE LAWYERING AND THE STATE, *supra* note 88. Cause lawyers may do their work largely within the established confines of the profession, Sarat, *supra* note 92; may be formally situated among elites or the state, Epp, *supra* note 1; Epstein and Kobylka, *supra* note 31; Lucie White, *Two Worlds of Ghanian Cause Lawyers, in* CAUSE LAWYERING AND THE STATE, *supra* note 88 ; Staggenborg, *supra* note 42; or may represent causes or organizations resisting progressive or rights-based movements. Ann Southworth, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008).

[95] Bloom, White, *supra* note 94; Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts*, *in* POLITICAL COMMITMENTS, *supra* note 33.

[96] Shamir and Chinski, *supra* note 95 at 230-31.

[97] Epp, *supra* note 1.

pay equity activists.[98] Still another approach focuses attention on the individual decision to participate in litigation as a political act.[99] Recently, scholars have begun to link studies of cause lawyering with existing work on social movements – bringing the focus more tightly on the question of when and how lawyers serve as contenders against the state.

Given the glamour of existing historical examples of elite movement lawyers, it is easy to overlook the potential for precedent-setting law or large-scale social change coming out of everyday legal practice. Yet that might be a fair description of how a brand new rights claim resisting sexual advances in the workplace began to emerge in the 1970's. Even more importantly, the legal pioneers in this story lacked not only glamour but structure. They built their cause, their network, and their bar case by case through individual acts of legal representation. Eventually this highly decentralized and semi-spontaneous effort to access rights-based remedies for a common workplace problem grew into something resembling a common cause – and ultimately one of the most significant EEO issues in the contemporary United States.

Ultimately, cause lawyers must be understood in tandem with the individuals they represent – who also can serve as catalysts for change through law.[100] Sociolegal scholarship on claims mobilization addresses how individuals and their counsel attempt to turn formal legal entitlements into meaningful remedies. Scholars have documented both the barriers to individuals successfully mobilizing claims,[101] as well as the extent to which individual private litigants can play a larger political role.[102] Importantly, litigants must conceptualize an injury as potentially subject to legal redress in order to engage the system – the process of "naming, blaming and claiming."[103] Thus, even if lawyers play an important role in shaping a new legal claim, the clients must take the first step. These cases demonstrate how individual mobilization is also an important factor in the development of cause and claim.

Existing accounts of the development of sexual harassment law in the United States have not fully explored this synergy of individual and organizational action. For example, a common theme assigns a quasi-mythic role to Catherine MacKinnon, who made a foundational

---

[98] McCann, *supra* note 1.

[99] Zemans, *supra* note 31; Marshall, *supra* note 12.

[100] Cause lawyers also must contend with ethical obligations toward clients, which may conflict with larger movement goals. Derrick Bell, *Serving Two Masters: Integration Ideals and Client Insterests in School Desegregation Litigation,* 85 YALE LAW JOURNAL 470 (1976).

[101] Albiston 2005, *supra* note 7; Neilsen and Nelson, *supra* note 32; Marshall, *supra* note 12; Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987).

[102] Zemans, *supra* note 31; Marshall, *supra* note 12.

[103] William L.F. Felsteiner, Richard L. Abel and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . ,* 15 LAW AND SOCIETY REVIEW 631 (1980).

scholarly and activist contribution but also benefited from the work of other who pursued early cases. Carrie Baker[104] suggests that favorable judicial politics largely explains plaintiff success during this period, yet a review of the ideological orientation of the deciding judges on each of the cases between 1971 and 1980 reveals no consistent pattern between ideology and outcome, and as Chapter 4 shows, the relationship between law and politics in this area is complex and changes over time. Strong comparative work on the United States and France[105] and the United States and Germany[106] favors cultural explanations, but these accounts do not delve into the early cases in much empirical detail. My project builds on the exploration of individual plaintiffs by Anna Maria Marshall,[107] by adding analysis of organizational, legal and political factors that this initial wave of case filings set in motion.

THE INVENTION OF SEXUAL HARASSMENT

Sexual harassment law in the United States was established by an organic, grassroots, loosely networked, geographically-dispersed legal uprising.[108] Much as the early feminist movement relied on a model of small group consciousness-raising to construct a larger social movement,[109] sexual harassment legal pioneers took small individual steps that ultimately converged to construct a new legal claim. In some cases the lawyers and plaintiffs had explicit political motives, or relied on existing causes and movements to bridge their claims. In other cases, garden-variety litigators tried to take individual narratives of harm and fit them logically into existing law. By reaching out and engaging the legal system to address a problem of women's inequality, they set a process in motion with far-reaching consequences.

Most early plaintiffs looked to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, as the starting point for their claims – although that statute did not address sexual harassment at all. Passed in 1964 as a package of anti-discrimination laws, Title VII barred workplace discrimination on the basis of race, sex, national origin and religion. As has been widely described elsewhere, the statute's inclusion of "sex" as a prohibited category is something of an historical accident.[110] The statutory language simply states that no employer may discriminate

---

[104] Baker, *supra* note 12.

[105] Saguy, *supra* note 25.

[106] Zippel, *supra* note 25.

[107] Marshall, *supra* note 12

[108] The analysis of the early cases, litigants and lawyers is based on my review and coding of all the available District Court opinions identified in Appendix 2, District Court Cases ("District Court dataset"), supplemented by information available in secondary sources including Baker and Marshall, *supra* note 12.

[109] Sheila Tobias, FACES OF FEMINISM: AN ACTIVIST'S REFLECTIONS ON THE WOMEN'S MOVEMENT 86 (1998).

[110] *Id.* at 81; Nicholas Pedriana, *Help Wanted NOW: Legal Resources, the Women's Movement and the Battle Over Sex-Segregated Job Advertisements,* 51 SOCIAL PROBLEMS 182, 187 (2004).

in the "terms and conditions of employment" on the basis of sex or other categories – a generalized prohibition subject to further interpretation and construction.[111] In any event, it is safe to say no member of Congress voting to pass this landmark legislation thought they were addressing sexual advances in the workplace.

Early Title VII enforcement focused heavily on race discrimination, leading the newly formed National Organization for Women to make a very public challenge to the U.S. EEOC's enforcement priorities.[112] However, the primary focus of early administrative enforcement and litigation of gender discrimination in employment was on structural barriers to women's participation in the workplace. Examples included gender-segregated want ads, explicit occupational segregation, de jure barriers to entry, and pay differentials.

The attention of national feminist organizations during the first decade of the women's movement was also heavily focused on the Equal Rights Amendment and the goal of constitutionally-based gender equality.[113] For example, during this same period of the early 1970's, Ruth Bader Ginsberg and the ACLU Women's Rights Project embarked on a gender equality campaign using the Equal Protection Clause of the 14th Amendment.[114] A 1977 Congressionally-authorized national women's conference in Houston adopted 26 planks of a women's rights platform. Plank 10, "Employment," dealt with pay and promotion issues,

---

[111] The potential ambiguity in this statutory language creates opportunities for other actors to construct the terms of enforcement. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AMERICAN JOURNAL OF SOCIOLOGY 1531 (1992). In addition, this ambiguity also made it possible to apply this statute to sexual harassment in the absence of any explicit legislative determination.

[112] Pedriana, *supra* note 4; Tobias, *supra* note 109.

[113] The newly formed National Organization for Women adopted a 1968 Bill of Rights, which "demanded":

- Immediate passage of the ERA
- EEOC enforcing Title VII's ban against sex discrimination "with the same vigor" as the ban against race discrimination
- Maternity Leave and support for child care
- Equal and "unsegregated" education
- Equal access to job training, housing and improved financial support for poor women
- Women's right to "control their reproductive lives."

Legal Momentum's History (formerly the NOW Legal Defense and Education Fund), , http://www.legalmomentum.org/about/history.html.

[114] Epp, *supra* note 1; Fred Strebeigh, EQUAL: WOMEN RESHAPE AMERICAN LAW (2009).

affirmative action, job training and other issues. Sexual harassment was not mentioned.[115] In general, major women's organizations were not visible players in the early years to establish sexual harassment as illegal sex discrimination.[116] However, by 1979, NOW was on record as opposing sexual harassment and women's organizations had begun broader mobilization.[117] As will be seen in chapter 4, public movement activism would be critical in preserving the new legal claim during the Reagan era.

With substantial feminist legal and organizational resources focused on attacking workplace segregation, de jure gender discrimination, and constitutional barriers to equality, the broad-scale social change wrought by the women's movement began to spill over into what seemed like more personalized harm. The workplace was opening to women formally, yet critical barriers remained. As Rosalyn Fraad Baxandall described in a memoir of the early days of the contemporary women's movement: "We understood that in order to keep some jobs, especially service and clerical work, women needed to wear makeup and give in to their bosses' outlandish demands."[118]

The first documented sexual harassment cases sought the extension of Title VII's ban on gender discrimination to sexual advances in the workplace.[119] In most of these cases, women experienced what came to be known as "quid pro quo" sexual harassment – pressure for physical intimacy or dating from their supervisors. They pursued a strikingly similar legal framework for their claims – applying sex discrimination law to these individual workplace

---

[115] National Commission on the Observance of International Women's Year, *Document 37: Plank 10: Employment*, from THE SPIRIT OF HOUSTON: THE FIRST NATIONAL WOMEN'S CONFERENCE (Washington, D.C.: U.S. Government Printing Office, 1978), pp. 42-48, at http://womhist.alexanderstreet.com/dp59/doc37.htm.

[116] It is difficult to identify the precise role played by the National Organization for Women in the early years. Karen DeCrow, President of NOW from 1974 to 1977 is mentioned as working with or assisting some plaintiffs in various sources. Legal Momentum's History, *supra* note 113. Yet the legal arm of NOW, the NOW Legal Defense and Education Fund (now operating under the name Legal Momentum) does not appear to have significant involvement in precedent-setting sexual harassment cases until the mid to late 1980's, Baker, *supra* note 12; Enid Nemy, *Women Begin to Speak Out Against Sexual Harassment at Work,* NEW YORK TIMES 38 (Aug. 19, 1975), although it did engage the regulatory and legislative arenas between 1979 and 1983 (*see* Chapter 3).

[117] Baker, *supra* note 12 at 89.

[118] Rosalyn Baxandall, *Catching the Fire, in* THE FEMINIST MEMOIR PROJECT: VOICES FROM WOMEN'S LIBERATION 208, 212 (1998) ("FEMINIST MEMOIR PROJECT").

[119] *Barnes v. Train*, 13 FEP Cases 123, (D.D.C. 1974); *Corne v. Bausch & Lomb,* 390 F.Supp. 161 (D. Ariz. 1975)*, Williams v. Saxbe,* 413 F.Supp. 654 (D.D.C. 1976)*, Miller v. Bank of Amer.,* 418 F.Supp. 233 (N.D. Cal. 1976)*, Thompkins v. Public Serv. Elec. & Gas Co.,* 422 F.Supp. 553 (D.N.J. 1976)*, Munford v. James T. Barnes & Co.,* 441 F.Supp. 459 (E.D. Mich. 1977).

interactions. Even though a number of judges summarily concluded this was private, interpersonal, and outside the scope of civil rights regulation, these plaintiffs and their counsel had access to consistent rights framing and language.

Yet there is little evidence these cases were filed as part of a strategic litigation campaign. Rather, they spontaneously "bubbled up" in a series of different locations where women reached out to lawyers individually for help with a problem on the job.[120] As described in more detail below, by and large, each case came about because of a personal experience or injury, rather than organized mobilization efforts. In only 3 of the District Court cases is there any record of organizational participation.[121] At least 3 cases began as *pro se* discrimination filings, without even a lawyer's assistance.

The cases in the first decade were widely geographically dispersed. Plaintiffs filed cases in at least 16 different states, covering every region of the country -- from the Northeast (NY, NJ, CT, PA, DC, VA) to the Midwest (IL, MI, OK), the West (CO, ND, AZ, CA, AK) and even the South (AL, TN).[122] That dispersion is consistent with a much more individualized, less organization-driven model of legal change. In only a few of these states, such as New York[123] and Michigan,[124] is there evidence of contemporaneous localized activism around the issue of sexual harassment. Cases were filed in states like North Dakota, Oklahoma, and Alabama, far from emerging feminist legal organizations in the Northeast and California.

---

[120] Early plaintiffs had a wide range of jobs – from managers and professionals to "pink-collar" office workers to working class women in blue collar jobs. *See* District Court Dataset.

[121] District Court Dataset.

[122] Appendix 2, District Court Dataset.

[123] In New York, activists engaged in consciousness-raising and organized an agency hearing in New York City. Baker, *supra* note 12.

[124] In Michigan, activists organized to pass a state law on sexual harassment. *Id.*

Table 1 States Where Sexual Harassment Cases Filed in Federal Courts 1971-1980

NORTHEAST	NY	CT	NJ	PA	DC	VA
MIDWEST	IL	MI	OK			
SOUTH	TN	AL				
WEST	CO	ND	AZ	CA	AK	

These early litigants constructed a previously non-existent legal entitlement to be free from sexually-based intimidation at work. The first documented complaints were filed beginning in 1971 although it was not until 1975 that feminist activists coined the phrase "sexual harassment" to describe the problem.[125] (The cases typically do not use the term "sexual harassment.") These plaintiffs and their lawyers brought civil rights law to bear on behavior that was not clearly a form of workplace discrimination – although Title VII didn't clearly exclude it either. District Courts were substantially (but not completely) resistant to the analogy.[126]

The earliest identified claim of what we now understand as sexual harassment arose in the District of Columbia, when Paulette Barnes filed an EEO complaint against her boss in December of 1971. He had eliminated her job when she refused to sleep with him. At the time there was little reason to believe this conduct was even illegal – let alone illegal because it was discriminatory. No court or agency had said so, no law professors had suggested this cause of action existed, no women's magazine had campaigned against it. Yet Barnes, who filed the claim initially without a lawyer, was able to name the harm as a violation of her rights and a form of discrimination. She ultimately obtained counsel and filed her case in federal District Court, claiming sex discrimination in violation of Title VII.[127] Jane Corne and Geneva DeVane

[125] Marshall, Baker, *supra* note 12.

[126] District Court Dataset.

[127] District Court Dataset; Marshall, Baker, *supra* note 12.

filed EEOC charges in Arizona after they were forced to quit because of their boss' sexually abusive language and conduct.[128] In New Jersey, Adrienne Tomkins filed a *pro se* EEOC charge when her employer responded to her sexual harassment complaint by demoting, then firing her.[129]

In all these cases, and a number of others, the judges rejected claims of gender bias in language that utterly dismissed the possibility of civil rights redress:

- "This is a controversy underpinned by the subtleties of an inharmonious personal relationship. Regardless of how inexcusable the conduct of plaintiff's supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff's sex."[130]
- "Mr. Price's conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge. . . It would be ludicrous to hold that the sort of activity involved here was contemplated by [Title VII]."[131]
- "While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse. . . . The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience. . . . It is not, however, sex discrimination within the meaning of Title VII."[132]

The language of these rulings characterizes the claims as commonplace, although somewhat socially distasteful, and above as "interpersonal," private, and unrelated to work performance or activity. The conclusions reached by these federal district judges reflected the novelty of this legal claim and the potential gap between existing conceptions of sex discrimination and the emerging challenge to sexual harassment.

Critically, plaintiffs did not consistently fail in these early efforts. A number of plaintiffs were able to successfully argue conduct similar to that alleged in *Barnes, Corne* and *Tompkins* constituted sex discrimination. For example, Diane Williams, who worked for the Department of Justice, brought quid pro quo harassment claims and prevailed in the District Court – although she had to go through multiple rounds of litigation to ultimately prevail.[133] In contrast

---

[128] *Id.*

[129] *Id.*

[130] *Barnes,* 13 FEP Cases 123.

[131] *Corne,* 390 F.Supp. 161.

[132] *Tompkins,* 422 F.Supp. 553.

[133] *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).

to the District Judges who were resistant to the idea of applying Title VII, Judge Richey, a Nixon appointee, concluded: "The retaliatory actions of a male supervisor, taken because the female employee had declined his sexual advances, constituted sex discrimination under Title VII of the Civil Rights Act of 1964." However, as explained below, a number of these early plaintiffs would need the assistance of appellate courts to prevail.

In addition to successfully establishing claims of quid pro quo sexual harassment, early plaintiffs also began to suggest that sexual harassment was itself discriminatory, even in the absence of a concrete employment injury. This was the basis of what would become known as "hostile work environment" claims. Like the quid pro quo claims, plaintiffs raising hostile work environment claims faced a mixed record at first in the District Courts. A notable example is *Bundy v. Jackson,* where the District Court actually found that "the making of improper sexual advances to female employees (was) standard operating procedure, a fact of life, a normal condition of employment." However, Title VII in that court's view offered no remedy, as this was not actually "discrimination in the terms and conditions of employment."

The record on appeal during this decade is far brighter. Every appellate court to consider whether sexual harassment constituted a violation of Title VII ruled in the affirmative – in every case reversing a District Court judge who concluded differently. In 1977, the DC, 3rd and 4th Circuits ruled sexual harassment violated Title VII, all reversing lower courts,[134] and the 9th Circuit vacated *Corne*. In 1979, the 9th Circuit has an actual decision applying Title VII to sexual harassment.[135] Between 1981 and 1983, the D.C. Circuit had reversed Bundy, and the 11th and 4th Circuits had ruled in favor of the concept of a hostile work environment.[136] Significantly, in these early appellate cases it appears that Republican judges ruled similarly to Democratic judges. Virtually all of these early Court of Appeals decisions were unanimous, all supported plaintiffs on the underlying legal principles and the vast majority favored plaintiffs on application to specific factual issues.[137]

As early as 1980, plaintiffs clearly already had the upper hand. Of 22 identified cases between 1971 and 1980, plaintiffs won 10 cases in the lower courts and gained five more victories on appeal (all reversals of trial court losses), while employers won 7 cases outright.[138]

---

[134] *Barnes v. Costle,* 561 F.2d 983 (D.C. Cir. 1977); Tomkins v. Public Service Electric and Gas Co., 568 F.2d 1044 (3d Cir. 1977); *Garber v. Saxon Business Products, Inc.*, 552 F.2d 1032 (4th Cir. 1977).

[135] *Miller v. Bank of Amer.*, 600 F.2d 211 (9th Cir. 1979).

[136] *Henson v. City of Dundee,* 682 F.2d 897 (11th Cir. 1982); *Katz v. Dole,* 709 F.2d 251 (4th Cir. 1983).

[137] Court of Appeals Dataset; *See also infra* Chapter 4.

[138] District Court Dataset. All cases could be coded as plaintiff or defendant wins – there were no mixed outcomes in this data set.

Table 2 Summary of Case Outcomes through 1981

	PLAINTIFFS	DEFENDANTS
DISTRICT CT	10	12
APPEALS CT	+5	-5
SCORECARD	15	7

The work of the lawyers and plaintiffs during this first decade served a critical agenda-setting function. They established the feminist theoretical framework that redefined a private and interpersonal activity as a form of sex discrimination, obtained unanimous appellate court decisions and the blessing of the leading federal enforcement entity for applying Title VII to sexual harassment, and began to create a sexual harassment bar of knowledgeable lawyers and associated organizational support. All those resources would serve to protect this new legal claim in a shifting political climate, as the issue moved through the appellate courts to the U.S. Supreme Court.

AN ECLECTIC ARRAY OF LEGAL PROFESSIONALS CONSTRUCTS A NEW LEGAL CLAIM

The lawyers who represented these early plaintiffs are an eclectic bunch.[139] Some were feminist activists at the vanguard of the women's movement. Others had a history or experience as lawyers in the civil rights community who were addressing race discrimination, and who used that as a bridge to a new civil rights claim. Some of the earliest lawyers for this cause had no explicitly political or activist orientation at all, but took the cases simply as litigators representing a client in need. Academics played an important role in early legal developments, bringing not only a decidedly non-ivory tower perspective, but eager volunteer law students to help. Finally, at least one key cause lawyer operated out of her role in the government bureaucracy.

[139] Determining the lawyers who represented plaintiffs in the early cases was based on reading and coding the decisions and on the detailed accounts in Baker and Marshall, *supra* note 12, about this first wave of litigation.

As the number of women in law schools jumped dramatically, newly minted "feminist law firms" launched to work specifically on women's legal issues. [140] A few of the earliest sexual harassment cases were brought by women lawyers or law firms with feminist political sensibilities, including *Corne* in Arizona, where their counsel Heather Sigworth had founded the Tuscon chapter of NOW and built a women's rights practice.[141] In Colorado, a feminist law firm sued Johns-Manville and won at trial.[142] Linda Singer, who represented Paulette Barnes on appeal, was a civil rights lawyer and affiliated with the Women's Legal Defense Fund (WLDF), while Mary Dunlap was the co-founder of ERA who represented Margaret Miller.[143]

Civil rights lawyers with experience bringing race discrimination claims also were responsible for key early cases. Michael Hausfeld was a cooperating counsel with the Lawyers' Committee for Civil Rights Under Law – originally formed to recruit lawyers in private practice to provide legal support for the civil rights movement. He took Diane Williams' case and built an analogy between race and sex discrimination. But as Anna Maria Marshall describes, he and his client had to work through the problem from scratch:

> When [Hausfeld] called the LCCRUL for advice in 1972, he got little advice: "They felt it was wrong, but nobody knew how to proceed."[144]

In some cases, plaintiffs turned to lawyers with little or no particular civil rights experience. For example, Maxine Mumford hired Thomas H. Oehmke, who had just opened a garden-variety litigation practice, and there are other examples of newly minted attorneys and even a personal injury lawyer taking on sexual harassment plaintiffs.[145]

Academics played a role in several important early cases. The academics in Ithaca, New York who went on to found Working Women United helped support a plaintiff named Carmita Wood in her unsuccessful attempt to obtain unemployment compensation when she left a job because of sexual harassment. That campaign for expanding unemployment remedies would begin a process of more structured organizational advocacy, as explained further below. The Rutgers Women's Rights clinic represented Tomkins, and Nadine Taub describes the 1973

---

[140] A review of the filed cases shows that where the gender of plaintiffs' counsel could be determined, it was fairly evenly split between all female litigators or litigation teams and either all male or mostly male counsel. District Court Dataset.

[141] Baker *supra* note 12.

[142] *Heely v. Johns-Manville*, 451 F. Supp. 1382 (D. Colo. 1978).

[143] Baker, Marshall, *supra* note 12.

[144] Marshall, *supra* note 12 at 786.

[145] *Id.* at 784.

experience of working through with the law students exactly why sexual harassment would violate Title VII.[146]

Perhaps the most well-known academic lawyer involved in sexual harassment litigation is Catherine MacKinnon. Indeed, if there were a Marshall or Ginsberg figure in this account, she would be the likeliest candidate. One of her most significant contributions was a manuscript, circulating by the mid-1970's, that laid out in detail a feminist theory of why sexual harassment was harmful to women. MacKinnon argued that women's experiences with harassment on the job should be conceptualized as specific examples of the general problem of sex discrimination in employment – "not simply humiliating, oppressive, and exploitative" but also operating to subjugate women as a class.[147] She also more formally conceptualized the theoretical framework of hostile work environment and quid pro quo cases. By 1979, she had published it as a book, the *Sexual Harassment of Working Women*, and she would go on to play a key role in the Supreme Court's ruling validating hostile work environment sexual harassment, *Meritor v. Vinson* (1986).[148]

THE U.S. EEOC

By the end of the first decade there is also a third key player – the United States Government. From enforcement to amicus briefs to regulatory actions, the U.S. EEOC was engaged in the development of sexual harassment law alongside individual litigants and movement activists.

The EEOC early on recognized "a pejorative work environment" as a form of discrimination. An internal agency history identifies EEOC decisions from 1969-1971 involving racial and ethnic slurs.[149] That documents notes that in addition to claims of racial harassment, that starting in 1972 "the Commission and the courts began seeing a new type of charge based on sex." Facing claimants asking for relief, the EEOC took the position that sexual harassment was a form of discrimination subject to Title VII. By 1981 there were at least 6 EEOC decisions addressing sexual harassment.[150]

The EEOC also began to file amicus briefs in sexual harassment cases, helping to set key precedents in favor of the new right. For example, the agency filed a brief on behalf of Adrienne Tomkins, telling the Third Circuit quite bluntly that the lower court was "simply

---

[146] Nadine Taub, *On Becoming a Feminist/Lawyer, in* FEMINIST MEMOIR PROJECT 304, *supra* note 118.

[147] MacKinnon, *supra* note 14 at 6-7.

[148] Cochran, *supra* note 24; Strebeigh, *supra* note 114.

[149] John Ross, Regional Attorney, Dallas District Office, A HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 1965-1984 at 58, 63, maintained at the Library of the U.S. EEOC, 131 M Street NE, Washington, DC 20507 ("EEOC Archives").

[150] Baker, *supra* note 12 at 120.

wrong" and "plainly wrong" in denying her claim for sexual harassment.[151] In *Bundy v. Jackson,* the agency appeared before the D.C. Circuit to argue in favor (without so naming it) of a hostile work environment that "persistent improprieties – imposed on female employees alone – were unlawful" and in violation of Title VII's guarantee of equal employment, even in the absence of a proven tangible employment action.[152]

Eleanor Holmes Norton, a noted civil rights lawyer, law professor, and elected official, was the most significant bureaucratic figure in the development of American sexual harassment law. In her role as chair of the New York State Commission on Civil Rights, she held hearings on sexual harassment. Later, when appointed chair of the U.S. EEOC she made sure that before President Carter left office, the Commission issued its new Guidelines on Sexual Harassment. Her agency action that effectively anchored the appellate court results in a set of regulations that binds the federal government – just before the political transformation of the Reagan Administration. This example of so-called "midnight regulations" (for their last minute post-election character) would be up for debate in the very first year new Republican administration.[153]

The new EEOC regulations codified sexual harassment as sex discrimination. Notably these guidelines go beyond the quid pro quo fact pattern to address workplace sexual harassment without any direct job consequences to an employee. The EEOC expanded the definition of "unlawful, sex-based discrimination" in its agency Guidelines on Discrimination to include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" where it either directly affects someone's employment or academic status, or where it creates "an intimidating hostile or offensive working or academic environment."

The EEOC published the draft guidelines in April of 1980.[154] In the preamble to the new regulation, the agency noted that "Sexual harassment, like harassment on the basis of color, race, religion, or national origin, has long been recognized by the EEOC as a violation of Section 703 of Title VII of the Civil Rights Act of 1964." Comments poured in from women's rights organizations (Women's Legal Defense Fund, Women Employed, the N.O.W. Legal Defense Fund, WEAL, National Council of Jewish Women, NOW, National Women's Political Caucus), unions (AFSCME), state and local regulators (CA Fair Employment and Housing Commission),

---

[151] *Tomkins v. Public Service Gas & Elec. Co.*, No. 77-1212 (3d Cir., 1977) Brief *Amicus Curiae* of the U.S. EEOC at 10, EEOC Archives. (The brief's sole argument heading reads: "It is a violation of Title VII for an employer or its agent to condition the employment opportunities of a female employee on her sexual cooperativeness.")

[152] *Bundy v. Jackson*, No. 79-1693 (D.C. Cir. Sept. 12, 1979), Brief *Amicus Curiae* of the U.S. EEOC at 13-14, EEOC Archives.

[153] *See infra* Chapter 3.

[154] 45 Fed. Reg. 25023, April 11, 1980.

and expert bodies (American Psychological Association).[155] Comments were overwhelmingly in favor of the proposed regulation, although opposition came from a few individual law firms and employers.[156] The U.S. Chamber of Commerce did submit comments stating its agreement that "acceptance or rejection of sexual advances should play no part in employment decisions" but urging that the proposed regulations be withdrawn and that "voluntary" employer responses would be a better approach.[157] On November 10, 1980, the EEOC published the Guidelines with minimal changes.

EVOLVING FROM INDIVIDUALS TO STRUCTURE

Over time, and especially as cases made their way to the court of appeals, these individual cause lawyers, proceeding from their different role orientations, begin to cohere into more of a structure. While initially different plaintiffs and lawyers in different places describe literally starting from scratch for a legal theory to challenge sexual harassment, counsel begin to share information and cooperate on cases. As activists came together to litigate individual cases, they also began to build capacity to press the issue of sexual harassment outside the courtroom. They generated early limited media attention and held speak-outs and activism outside the court room to raise the profile of the issue.[158]

What emerges is a loose feminist network of sexual harassment litigators and nascent organizations. Three explicitly feminist organizations played an important role in appellate litigation. Working Women United, founded by the Ithaca activists who coined the term sexual harassment, provided strategic advice and a study that was used in legal briefs.[159] The new Women's Rights Clinic at Rutgers represented Adrienne Tomkins. And the founder of Equal Rights Advocates in California represented Margaret Miller and appeared as an *amicus curiae* in *Tomkins*. The Mexican American Legal Defense Fund filed *amicus curiae* briefs in *Miller* and *Tomkins*. There is evidence that at least these organizations collaborated with each other, and with feminists at Yale University, including Catherine MacKinnon, who were pursuing a parallel claim for sexual harassment in education. The New York activists in turn influenced Norton, who became responsible for the national guidelines.[160]

---

[155] From personal review of submitted comments, EEOC Archives.

[156] *Id.*

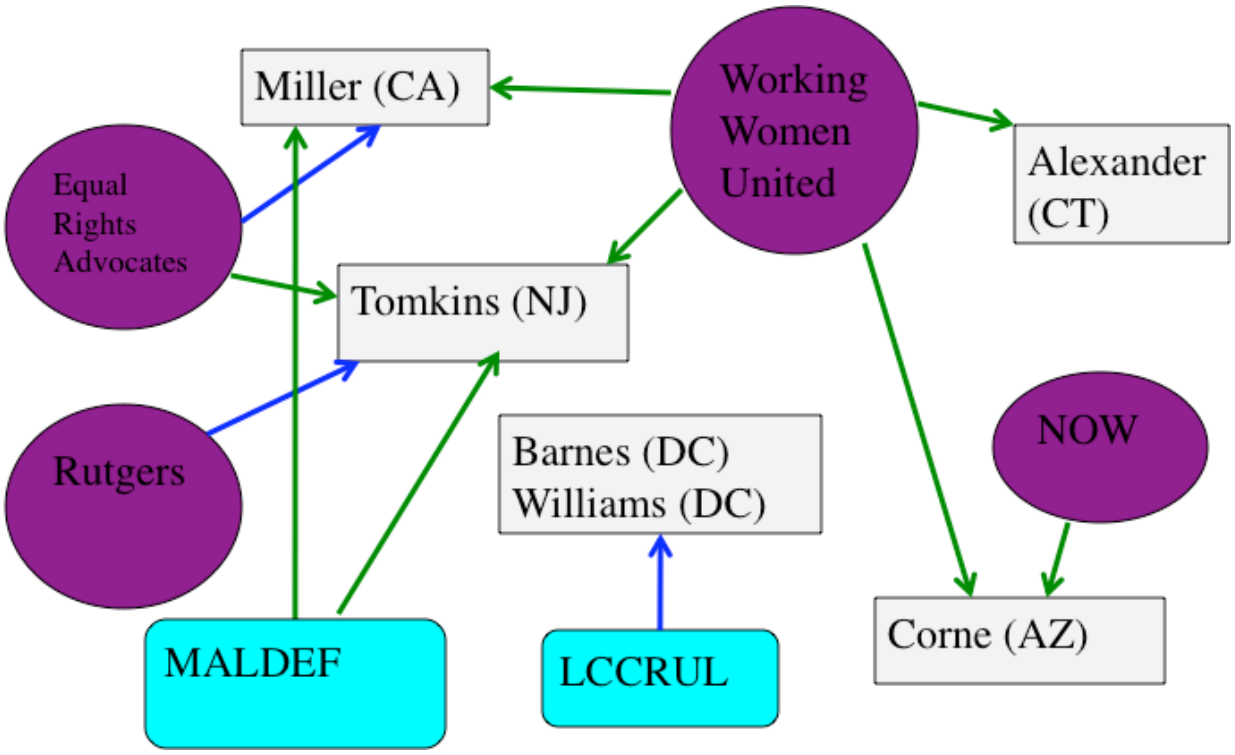
[157] Submission of the U.S. Chamber of Commerce, EEOC Archives.

[158] *See* Baker, *supra* note 12; Nemy, *supra* note 116.

[159] Baker, *supra* note 12

[160] *Id.*

Figure 3 Pre-1980 Sexual Harassment Cases Featuring Social Movement Support/Activity



Key:

Green arrow = strategic advice, amicus participation

Blue arrow = provided legal representation

Purple ovals = women's movement SMO

Aqua rectangles = civil rights movement SMO

Thus, when the issue of sexual harassment reached the Supreme Court in 1986, there was a substantial infrastructure in place. At that point, 5 Circuits had ruled in favor of applying Title VII to sexual harassment and none had concluded otherwise. Republican and Democratic judges had voted overwhelming in favor of the plaintiffs and unanimously on the underlying principle.[161] Cases had validated both quid pro quo and hostile work environment theories. And the new EEOC guidelines were in effect.

The now extensive cause lawyering and movement infrastructure was deployed on behalf of the plaintiffs. MacKinnon helped represent the plaintiffs and write the Supreme Court

[161] *See infra* Chapter 4.

brief, a former director of the NOW Legal Defense Fund provided support, amicus briefs came from women's organizations, including key anti-sexual harassment groups like the WWI, labor, women's legal groups and even state attorneys general weighed in on behalf of the plaintiff. Michele Vinson was also represented by Pat Berry, a solo practioner who represented individual plaintiffs in employment cases and had been represented below by a former EEOC lawyer.[162]

The Supreme Court issued a unanimous ruling – with two opinions – holding that sexual harassment violated Title VII.[163] The opinion of the court, authored by William Rehnquist, soon to be elevated by President Reagan to Chief Justice, held that sexual harassment was a form of sex discrimination, and that the hostile work environment theory specifically was valid. Notably, by that point the idea of sexual harassment as sex discrimination was established to the point where Justice Rehnquist could declare that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex."[164] The petitioner did not even try to argue against this proposition, confining the challenge to the issue of whether an actual negative, "tangible" employment consequence was required.

Then Justice Rehnquist turned to the EEOC guidelines, which were conclusively authoritative in this situation:

> In concluding that so-called "hostile environment" (*i.e.,* non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. . . Courts applied this principle to harassment based on race, *e.g., Firefighters Institute for Racial Equality v. St. Louis,* 549 F.2d 506, 514-515 (CA8), *cert. denied sub nom. Banta v. United States,* 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East,* 178 U.S.App.D.C. 91, 98, 545 F.2d 169, 176 (1976), religion, *e.g., Compston v. Borden, Inc.,* 424 F.Supp. 157 (SD Ohio 1976), and national origin, *e.g., Cariddi v. Kansas City Chiefs Football Club,* 568 F.2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

---

[162] Cochran, *supra* note 24.

[163] *Meritor v. Vinson,* 477 U.S. 57 (1986).

[164] 477 U.S. at 64.

> Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.[165]

Finally the decision considered the critical issue of the standard for employer liability – a point where the court's unanimity would diverge. This was the issue where the EEOC and the United States had taken a position opposing the plaintiffs, arguing for a very limited liability standard. Declining the invitation to set a high bar, the court's opinion deferred the question, setting the stage for years of litigation over the issue.

BRIDGES AND RESOURCES

Between the mid 1970's and 1986, the work of appellate litigation generated a loose cooperative network that should be considered in light of a larger movement structure. Prior civil rights activism generated both a legal framing language of rights and an existing group of anti-discrimination lawyers, to help support these early cases. Contemporaneous women's movement activism provided additional potential resources. Since the existence of legal resources has been critical to the advancement of rights in a number of historical and cultural contexts, how early sexual harassment plaintiffs and lawyers drew on movement resources may be an important part of this story.[166]

Early litigants clearly benefitted from relationships with both the law and lawyers of the civil rights movment. As a number of scholars have observed – a large proportion of the earliest plaintiffs were African-American women. Paulette Barnes, Diane Williams, Mechelle Vinson, Sandra Bundy, Margaret Miller, and Maxine Munford challenged sexual harassment at work using the statutory tools, legal precedents, and in many cases the lawyers and legal networks created through the civil rights movement.[167] In Epp's account, rights revolutions come out of the structural benefits of established liberal legal organizations. In this case both a pre-existing legal structure for civil rights claims, and the ongoing feminist activism in public consciousness and the courts, may have supported emergence of this new claim.[168]

The existing legal precedents on race discrimination were particularly significant. Indeed at oral argument in *Meritor,* Justice O'Connor explicitly asked the counsel for defense why the Court should not import the existing liability framework from racial harassment

---

[165] 477 U.S. at 65-66. Apparently the Guidelines were discussed by the Justices at conference. Cochran, *supra* note 24 at 110-120.

[166] Epp, *supra* note 1.

[167] Baker, Marshall, *supra* note 12.

[168] Of potential interest is the extent to which engagement with law specifically structured this activism in particular ways – along the lines of Reva Siegel's ERA proponents and opponents. Reva B. Siegal, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the ERA,* 94 CALIFORNIA LAW REVIEW 1323 (2006).

cases.[169] Malcolm Feeley in reviewing the Supreme Court's jurisprudence, used the concept of a "bridging case" to explain why previously disfavored legal principles became adopted when presented in the context of opposing racial segregation.[170] Of the 72 appellate cases on sexual harassment decided by 1991, one third of them relied on or cited to prior race discrimination cases, as did the Supreme Court.[171] As explained in Chapter 4, these "race bridge" cases are prominent in the citation network as well.

Ultimately, this diverse array of legal professionals, some operating autonomously, some working in loose confederation and sharing resources and information, successfully constructed a new civil rights claim. Re-interpreting widely tolerated behavior as sex discrimination, and persuading courts to agree, was both the typical work of lawyers trying to address the concerns of their clients, and a significant feminist power shift. Sexual harassment plaintiffs used the resources, networks, language, and legal precedents of the civil rights movement, and the parallel cultural and legal shifts wrought by the larger women's movement, to advance their claims.

In the first decade, 1971 to 1980, lawyers, plaintiffs and organizations laid a substantial foundation. During the period 1980-1991 the cause of sexual harassment gained further footholds in the courts and larger American culture, and more formal social movement backing.[172] At the same time, starting in 1981, and as we will see in Chapter 3, a new Republican President, an emerging political hostility to civil rights at the U.S. EEOC and the Department of Justice, and a rightward-trending judiciary would become potential obstacles to expanding Title VII to new civil rights claims. The legal foothold established by this case-by-case process during the first decade, and the evolving movement infrastructure it generated, served as a critical resource as political winds shifted. It is this organization that seems to have served as a basis for resistance and may have limited the scope of retrenchment.

---

[169] Cochran, *supra* note 24 at 105.

[170] Malcolm Feeley, *The Black Basis of Constitutional Development, in* Harry N. Scheiber, ed., EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 49 (2007); Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV 429 (1934).

[171] Appellate Court Dataset.

[172] Zippel, *supra* note 25; Baker, *supra* note 12.

BACKLASH POLITICS AND SEXUAL HARASSMENT LAW (1980 – 1991)

ABSTRACT

This chapter asks how a changing political opportunity structure affected the trajectory of this claim. It analyzes how Reagan-era politics interacted with more sophisticated organizing and emerging legal constraints during the 1980's. An increasingly conservative political environment presented clear barriers to mobilizing support for expanding legal remedies for sexual harassment, but was not monolithically hostile. On the one hand, a politically conservative Administration initially sought to overturn the regulations on sexual harassment, conservatives headed the EEOC and other agencies, Republican appointments to the bench increased, and the business community sought to limit the new right and had greater political support in doing do. On the other hand, this is an era of increasing victories for women's rights in the courts generally, of a continued increase in the number of women in the workplace, and both Congress and the EEOC itself remained publicly supportive of laws against sexual harassment. I find that proponents organized to successfully resist partisan political opposition and that opponents failed to engage at the same level. This difference enabled proponents to convince the new Administration to preserve existing regulations, a key turning point in overcoming the hostility of the national political environment.

INTRODUCTION

The 1980's should have brought the expansion of sexual harassment law to a halt. With the election of Ronald Reagan, the political environment took a sharp right turn, and civil rights advocates were suddenly on the defensive. But a surprising thing happened on the way to reversing liberal judicial rulings and the EEOC's brand new regulations in this area: nothing. Indeed, by the end of the decade an increasingly conservative Supreme Court had ratified the key elements of the legal framework and a Republican-led EEOC had acted repeatedly to preserve and enforce it. The "backlash" dynamic of the 1980's that fueled an anti-feminist and anti-civil rights politics[173] left sexual harassment law largely untouched.

Scholars have used the concept of a national political environment as a key variable in explaining outcomes. Examples range from assessing the impact of a Presidential or Congressional political agenda on Supreme Court decision-making[174] to asking how large-scale economic, social and political changes created a favorable environment for the emergence of

[173] Susan Faludi, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

[174] Epstein, et al; Matlzman, et al, Ginsburg, *supra* note 28.

the civil rights movement.[175] Given that one would expect the election of 1980 to have a negative impact, understanding how advocates resisted the effect of ascendant conservatism on this new civil right becomes a critical question.

As some critics suggest, the notion of a political opportunity structure can be a convenient catch-all explanation[176] - especially because in context it is usually applied post hoc and rarely falsifiable. Those critiques apply to this case as well. However, the virtue of the analytic framework is that it focuses attention on changes in large scale political, economic and social forces – changes that can yield opportunities for action. In this regard it resembles the concept of "policy windows" or cycles of innovation and equilibria found in studies of policymaking.[177] In this case it has the potential to shed light on three important issues – the role of the federal government and EEOC, the importance of the timing of litigation, and the ability of proponents and opponents to secure their preferred legal rules.

On the surface, the political environment seemed overtly hostile to a feminist-driven expansion of Title VII law. Shortly after he took office in 1981, President Reagan and his Administration moved forward with a new sweeping pro-business review of federal regulations, including the new EEOC regulations on sexual harassment. Driven by a "states' rights" view of anti-discrimination law, conservatives took control of the EEOC and other key elements of the bureaucracy, and they pushed to review or undo key Title VII legal victories in a host of areas -- and remake civil rights enforcement patterns across the federal government. New conservative appointments to the federal bench meant employers would have an easier time arguing against liability for harassment at work. These major political shifts threatened to close off this new legal innovation supported by only a handful of appellate rulings.

And yet, there were plenty of contrary indicators over the same time period. First and foremost, the women's movement continued its legal, social and political advances, in particular winning numerous constitutional victories on gender equality.[178] Second, as explained in Chapter 2, the major federal enforcement agency, the U.S. EEOC, had already invested close to a decade of institutional practice in support of treating sexual harassment as a legitimate civil rights issue, making it hard to backtrack on its existing record of investigation, regulatory engagement and litigation. And third, as this chapter will show, it turned out that laws against sexual harassment were politically popular and lacked a serious and organized public opposition. In other words, the evidence of a politically hostile environment turns out to be decidedly mixed.

---

[175] McAdam, *supra* note 5.

[176] *See generally* David S. Meyer, *Protest and Political Opportunities,* 30 ANNUAL REVIEW OF SOCIOLOGY 125 (2004).

[177] John W. Kingdon, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1984); Edward G. Carmines and James A. Stimson, ISSUE EVOLUTION (1989); Frank R. Baumgartner & Bryan D. Jones, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993).

[178] Epp, *supra* note 1; Siegal, *supra* note 168.

Indeed it is that third indicator that appears particularly salient. Women's and civil rights social movement organizations actively participated in appellate litigation and the development of caselaw and regulations, and their level of participation (serving as counsel, *amici*, commenting on regulations, advocating with Congress, etc.) far outweighed organized oppostion by the business community.[179] Business-friendly organizations like the Chamber of Commerce and Equal Employment Advisory Committee were largely absent from the debate until the issue reached the Supreme Court, at which point the battle over the underlying legal rules was already lost. To the extent Epp finds that organized and resourced legal activism enabled women's rights to prevail before a conservative Supreme Court,[180] this case is consistent with that finding, and identifies an additional relevant factor: the degree and organization of the opposition.

This chapter addresses that complicated historical record. It considers the changing composition of the federal courts, the conservative challenge to the Carter administration's EEOC guidelines on sexual harassment, and the larger political and legal controversy over civil rights law. It considers judicial appointments, developments at the EEOC, government litigation positions, and the emergence of the Chamber of Commerce and the business community in Supreme Court and appellate court litigation of workplace rights. It also addresses potential limiting factors in assessing political hostility, including favorable legislative and regulatory developments.

One of the core themes of this project is to develop a more multi-faceted analysis of political forces in law. In considering the effect of a changing partisan political environment on the development of law, one might reasonably assume that the very public debates of the 1980's over civil rights, affirmative action, and the role of government would obviously result in an across-the-board resistance to an agenda promoted by feminists, labor and plaintiffs' lawyers. Although the top-down effort to impose a conservative agenda clearly made things more challeging for civil rights plaintiffs, at lower levels of the government and in the courts the conservative attempt to roll back sexual harassment law had to operate through less visible bureaucratic decisions that remained below the political radar screen.[181]

This lack of visibility extended to the public understanding of the issue. Even in 1980, the legal right to be free from sexual harassment seems to have a limited foothold in public consciousness. Media mentions of sexual harassment at this time are a fraction of what they would be by the Hill-Thomas hearings of 1991.[182] A popular comedy movie released in 1980, *9 to 5,* addresses the challenges of opening the workforce to women, including blatant sexual harassment of one of the main characters. Yet the term sexual harassment is never used and

---

[179] In the Court of Appeals Dataset there are no organizational *amici* appearing on behalf of defendants.

[180] Epp, *supra* note 1.

[181] John D. Skretney, THE MINORITY RIGHTS REVOLUTION (2002).

[182] Saguy, *supra* note 25.

there is no sense that any legal remedy against the boss' chauvinistic behavior exists. The combination of low public awareness, a largely regulatory debate, and a relatively small number of cases may also have provided some protection from backlash.

Through fortuitous historical timing, by 1980 all the legal elements were in place. The unanimous appellate record, the EEOC's "midnight" regulations, and the social and political gains of the women's movement helped to anchor the new right against retrenchment. Despite dramatic national political changes beginning in 1980, there was no corresponding dramatic shift in sexual harassment law.

THE NEW ADMINISTRATION OPENS FOR BUSINESS

In the spring of 1981, just a few months after President Reagan took office, the new Administration moved quickly to address regulatory reform. A brand new Presidential Task Force, led by the Vice President, put out a public call for the nomination of regulations that needed to be "reviewed" and potentially curtailed or eliminated. The new Executive Order 12291 would require federal agencies to undertake a review of specified regulations and make recommendations as to whether they needed to be revised or rescinded.

In August 1981, the Presidential Task Force on Regulatory Relief placed the new sexual harassment guidelines under scrutiny.[183] This was hardly a surprise; they were midnight regulations placing greater burdens on employers in a newly developing area of law where only a handful of federal courts had weighed in. Indeed, the Task Force had apparently received several comments requesting review of the guidelines and expressing concern about their application. These were likely similar to the concerns a few employers expressed when the EEOC drafted the original regulations for notice and comment.

This interest in regulatory reform reflected larger political trends, as a vigorous conservative counter-mobilization to the labor, civil rights and environmental activism of earlier decades began to take shape. Composed of libertarian law reformers, pro-business organizations, and conservative social policy advocates, they frequently found common cause in opposition to liberal impact litigation in federal court. Following the so-called Powell Memorandum[184] the Chamber of Commerce developed an impact litigation program and conservatives began to launch a series of organizations that frequently resembled the legal advocacy organizations of the left.[185] New conservative legal groups such as the Center for

---

[183] Baker, *supra* note 12.

[184] When Lewis F. Powell was in private practice (before he became a Supreme Court Justice), he wrote a now famous 1971 memorandum to the Chamber of Commerce encouraging them to develop a formal impact litigation program, among many other activities to counter what he termed the "attack" on free enterprise and American business.

[185] Southworth, *supra* note 33.

Equal Opportunity founded by Linda Chavez[186] and the Center for Individual Rights[187] sprang up to oppose affirmative action and race-conscious remedies. These organizations began an extensive program of political and public advocacy and in the case of CIR, litigation, aimed at reversing court decisions and administrative rules favoring affirmative action in employment and education.

In 1982, conservative law students at Yale and the University of Chicago launched a new organization – the Federalist Society.[188] Drawing on existing conservative intellectual and financial infrastructure, the Federalist Society became a national organization based in DC, with chapters at law schools across the country, and a membership composed of lawyers, law professors as well as law students. While this new pro-business and individual rights orientation of the conservative movement had important effects on a whole range of federal regulations such as environmental and consumer protections and labor relations, it promised to radically shift the government's civil rights positions.

THE CIVIL RIGHTS BACKLASH

When Reagan took office, his appointees moved quickly to remake the entire federal civil rights agenda.[189] Since the 1960's the U.S. Department of Justice had been engaged in civil rights enforcement and new federal statutes addressed discrimination in many aspects of social and economic life. Although from the perspective of movement activists, the federal government had moved far too slowly to address school segregation and workplace and housing discrimination, the pendulum was nevertheless shifting away from broad-scale civil rights enforcement at the national level.

At the Department of Justice, Assistant Attorney General for Civil Rights William Bradford Reynolds represented a clear break with the past. As head of the Civil Rights Division, Reynolds dramatically revised enforcement practices away from the kind of precedent-setting impact litigation that had been a feature of the Division[190] toward smaller scale individual discrimination cases. More significantly, he pressed forward the argument that affirmative

---

[186] Mission statement available at http://www.ceousa.org/content/view/533/127/ (last visted July 3, 2011).

[187] Mission statement available at http://www.cir-usa.org/mission_new.html (last visited July 3, 2011).

[188] Southworth, *supra* note 33.

[189] Farhang, *supra* note 58.

[190] For example, in *United States v. Teamsters*, 431 U.S. 324 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Civil Rights Division brought large-scale pattern and practice hiring discrimination claims on behalf of Blacks and Hispanics. These and other similar cases led to precedent-setting Supreme Court cases that defined the scope of Title VII's systemic remedies.

action was "reverse discrimination" and counter to the true principles of the 1964 Civil Rights Act.[191] Under Reynolds the federal government became a much more frequent opponent of civil rights organizations and intervened in cases on the other side of civil rights plaintiffs, drawing fire from civil rights advocates for changing course.[192]

Another key civil rights enforcement agency at the Department of Labor simply reduced its enforcement. The DOL Office of Federal Contract Compliance Programs (OFCCP) ensures that federal contractors comply with the affirmative action requirements of Executive Order 11246, in addition to policing employment discrimination by federal contractors through regular auditing and review of their workforce data. At the OFCCP, cutbacks in staffing and enforcement reflected the lowered regulatory environment and resistance to substantial government activity under federal civil rights laws.[193]

Some similar changes in focus and personnel took place at U.S. EEOC, which had played such a critical role in the first decade of sexual harassment law. Clarence Thomas was President Reagan's choice to become chair of the EEOC, and he took a much more limited view of the EEOC's enforcement power. Like Reynolds, he scaled back systemic enforcement, eliminated affirmative action remedies in litigation, and took a critical view of pattern and practice and statistical cases in general.[194] Overall EEOC caseloads fell dramatically and skewed much more heavily toward individual cases.[195]

THE REAGAN REVOLUTION AND THE FEDERAL COURTS

Perhaps the signature accomplishment of the Reagan Administration was the long term remaking of the federal bench. President Reagan appointed 360 federal judges, including nearly half of all full-time appeals court judges. He appointed three Supreme Court Justices (O'Connor, Scalia, and Kennedy) and elevated Rehnquist to Chief Justice. By the time Reagan left office, his appointees constituted 48.1 percent of the 160 judges serving full time on the appellate courts and, including senior judges, 33.9 percent of the complete set of 227 federal Circuit Judges.[196]

---

[191] Raymond Wolters, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION AND BLACK CIVIL RIGHTS (1996).

[192] Farhang, supra note 58.

[193] Linda Hamilton Kreiger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, *in* Faye J. Crosby, Margaret S. Stockdale, S. Ann Ropp, eds SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES 295, 306 (2007).

[194] Norman Amaker, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988).

[195] Krieger, *supra* note 193.

[196] Nadine Cohudas, *Reagan's Legacy is Not Only on the Bench*, 46 CONGRESSIONAL QUARTERLY WEEKLY REPORTS 3392 (Nov. 26, 1988).

The Supreme Court, as its composition changed to add more conservative justices began to pull back on key civil rights precedents. A series of adverse decisions for civil rights plaintiffs galvanized the civil rights advocacy community, which ultimately persuaded Congress to legislatively override them.[197] For example, in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), the Court dramatically tightened the standards applicable to disparate impact cases as well as requiring stricter statistical showings for proof of discrimination. The effect of this case was to increase the burden on plaintiffs seeking to show a neutral employment practice resulted in a lower hiring rate or other impact. *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989), held that a key existing post-Reconstruction civil rights statute, 42 U.S.C § 1981, did not apply to "post-contract" employment discrimination. In these and other rulings during the late 1980's, the Court turned to heightened burdens of proof in discrimination cases, and other structural limitations as well as moving to the right on affirmative action and other expansive remedies. [198]

However, during this time the Supreme Court also continued to issue favorable rulings on constitutional equal protection claims based on gender. In a series of cases in the 1970's, beginning with *Frontiero v. Richardson,* 411 U.S. 677 (1973), the Court established that sex-based classifications violated the Equal Protection Clause and the framework for assessing 14th Amendment violations in the context of gender discrimination. Here there was no backtracking after 1981. For example, in *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982), the court struck down the exclusion of men from a state nursing school, and in *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984), upheld the application of a state statute requiring equal access to public accommodations to an all-male social club. This was a period of continued feminist organizing on a range of issues, and an extended cultural debate over the Equal Rights Amendment.[199]

During this period, women's labor force participation also continued to increase. Following a rapid rise from 1975 to 1980, women continued to enter the paid labor force at an increasing rate from 1980 to 1990 – although the rate of increase became less steep. According to BLS data, women comprised 46% of the labor force in 1975, 51% in 1980, 54% in 1985 and 57% in 1990.[200] This economic change provides both a reason sexual harassment in the workplace might become a significant legal issue and a basis for political institutions to take that concern more seriously.

---

[197] Farhang, *supra* note 58.

[198] Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradictions, Rationalization, Denial*, *in* David Kairys, ed. THE POLITICS OF LAW 285 (1998).

[199] Siegel, *supra* note 168.

[200] Bureau of Labor Statistics, WOMEN IN THE WORKFORCE: A DATABOOK (2010), available at http://www.bls.gov/cps/wlf-databook2010.htm (last visited July 3, 2011).

Epp suggests that a depth of organized legal resources made it possible for women's rights advocates to prevail even before a conservative court.[201] As we saw in Chapter 2, advocates for sexual harassment as a new legal claim used similar resources in litigating their issue before the appellate courts and the Supreme Court. One important additional factor in this case is that visible organization happened only on one side of the litigation.

Surprisingly, despite the Chamber of Commerce litigation program and the newly emergent conservative public interest legal movement, sexual harassment opponents did not similarly engage the appellate courts. There were ten cases out of 72 decided by 1991 that involved amicus briefs for plaintiffs – and 0 cases involving *amicus* participation for defendants.[202] The only case where *amici* appeared on behalf of employers was in the *Meritor* case before the Supreme Court. At that point it was already too late to argue against the concept of a civil right to be free from sexual harassment with all prior appellate courts having ruled favorably. This lack of prior organized opposition made the job of proponents far easier than it might have been.

BUREAUCRATIC RESISTANCE AT THE EEOC

Similarly, differences in political mobilization appear to have carried the day in the critical matter of the viability of the EEOC sexual harassment guidelines. In December of 1980, just weeks before the newly-elected Republican President Ronald Reagan would take office, Eleanor Holmes Norton, the outgoing chair of the U.S. EEOC played her last "social movement insider" card – finalizing the Commission's regulations on sexual harassment. Soon after the changeover, those regulations were facing review and potential recision.

Although the EEOC Commissioners are bipartisan, they are appointed by the President and Reagan had the opportunity for multiple appointments. For the first year after Reagan took office, the EEOC functioned under an acting chair, Commissioner J. Clay Smith, Jr.appointed on March 3, 1981. On May 6, 1982, Clarence Thomas became Chairman, along with two other new Commissioners appointed by President Reagan. At that point Reagan appointees dominated the EEOC and would going forward. Between 1981 and 1983, 4 new Commissioners were appointed (Thomas, Cathie Shattuck, Tony E. Gallegos and William A. Webb). Only Armando M. Rodriguez, who had been appointed in 1978, was a pre-Reagan Administration appointee.[203] Rodriguez departed and was replaced by Fred W. Alvarez in 1984. Thus Reagan made multiple early appointments and eventually had appointed all the serving commissioners.

Once the Presidential Task Force asked the EEOC to take up the issue of the Guidelines, there was apparently substantial pressure on the agency. Internal EEOC memos stated on

---

[201] Epp, *supra* note 1.

[202] Court of Appeals Dataset.

[203] Commissioners and appointment dates from EEOC Annual Report FY1983, EEOC Archives.

November 9, 1982, that since 1981 "the Office of Management and Budget (OMB) has continued to pressure Commission staff to expedite the review."[204]

The EEOC's FY1982 Annual Report, issued in March of 1983, discusses the Presidential Task Force on Regulatory Relief, and notes that two federal regulations subject to review fell under the Commission's jurisdiction – the Guidelines on Sexual Harassment and the Uniform Guidelines on Employee Selection Procedures. The 1982 report explains that the Sexual Harassment guidelines were being studied "because of public comments critizing them for failing to provide adequate guidance to employers on such questions as what constitutes unwelcome sexual advances or prohibited verbal sexual conduct under Title VII. . . . During FY 82, Commission staff continued to analyze comments from the public on these guidelines and to explore and analyze options for the Commission's review of these guidelines."[205]

The Commission staff determined to address the threshold question of whether review was warranted before proceeding. Staff could only identify 2 factors "in favor of initiating a review" – the fact that the Task Force had identified the regulations as warranting review, and the fact that "according to commentators" to the Task Force (who are not specifically identified), "they do not provide adequate guidance" regarding what sexual harassment is, and that they expand employer liability too broadly.[206] According to these internal agency memoranda, staff then found nine numbered reasons to decline review. One of these included the fact that only four comments were submitted to the Task Force originally requesting review of the Guidelines. A further numbered reason was that once the potential review was announced, "the Commission has received nearly 100 unsolicited comments (approximately 25 times the number of comments submitted to the Presidential Task Force) expressing support for the Guidelines and rejecting any need for their revision. The Commission has received only one comment supporting the revision of the Sexual Harassment guidelines."[207]

The staff analysis goes on to elaborate on the political delicacy of overturning the guidelines. It explains that "most" of the 160 comments received when guidelines originally issued were supportive, and that they are consistent with legal rulings and deferred to by courts.

---

[204] Internal US EEOC Memorandum from Nestor Cruz, Acting Legal Counsel, Office of Legal Counsel to Alvin Golub, Office of Program Research (Nov. 9, 1982), maintained at National Archives at College Park, Maryland ("NARA") ("Cruz Memorandum").

[205] U.S. EEOC, 17th Annual Report, FY1982 (April 19, 1983) at 26, EEOC Archives.

[206] Cruz Memorandum, *supra* note 204.

[207] *Id.* At the request of Chairman Thomas, this analysis was converted to an Options Memorandum on January 26, 1983, which repeats verbatim the content of the Cruz Memorandum and was part of the EEOC's file of this determination. Internal EEOC Memorandum to Alvin Golub, Director, Office of Program Research from Elizabeth Thornton, Associate Legal Counsel, Coordination and Guidance Services (January 26, 1983), maintained at NARA.

> The Guidelines have received widespread support from women's groups and civil rights organizations in general. Accordingly, any action to review the Guidelines is likely to be controversial and most certainly highly publicized.

The internal staff memo also suggests that based on coversations, OMB itself has backed off its position that the sexual harassment guidelines needed to be reviewed, while noting that "OBM is unwilling to confirm this in writing."[208]

On March 8, 1983, the Commission held a formal meeting and heard a presentation from Robert Walker, Office of Legal Counsel on the proposed review of the Sexual Harassment Guidelines under EO 12291:

> Robert Walker, Attorney-Advisor, Office of Legal Counsel, presented the subject item and recommended that the Commission inform the Presidential Task Force on Regulatory Relief that there is no reason to initiate a review at this time in view of the widespread public support of the Guidelines and the deference given to them by the courts.

The three Commissioners present, including Thomas, all voted to adopt the recommendation and decline review.[209]

This decision to continue the guidelines would have many implications. Following their issuance in 1981, they became (as the EEOC itself noted) widely cited by courts, and this continued in the decisions leading up to *Meritor.* Indeed, as seen in Chapter 2, Justice Rehnquist explicitly relied on aspects of the Guidelines in the *Meritor* decision.

In addition, once the Guidelines were in place, the EEOC began to track the number of sexual harassment complaints filed each year. In the very first year the complaints numbered over 3400 and they continued to rise. This may have put further pressure on the agency to pursue enforcement rather than rescinding the regulations.

---

[208] Cruz Memorandum, *supra* note 204.

[209] US EEOC, Commission Meeting Notes (March 8, 1983), maintained at EEOC Archives.

Table 3: Sexual Harassment Charges Before US EEOC 1980 - 1991

Year	*Total Sex Discrimination Charges Raising Sexual Harassment Issue*	*Total Charges Raising Sex Discrimination as an Issue*	*Total Charges Filed*
1980		35494	93814
1981	3453	44977	94460
1982	4195	45255	92400
1983	4468	54636	**
1984	5003	55615	**
1985	5874	58998	117204
1986	4119	51004	105183
1987	5152	55295	110299
1988	5056	53905	112946
1989	5110	53130	106428
1990	3101	29610	62405

(Table compiled from EEOC Annual Reports FY 1981 – 1990, EEOC Archives. No total charge data available for 1983 or 1984).

LEGISLATIVE POLITICS AND SEXUAL HARASSMENT LAW

While Congressional and other federal government activity on sexual harassment during this period was limited, that record similarly suggests that proponents had the upper hand politically. There had been one hearing on sexual harassment before the Subcommittee on Investigations of the House Committee on Post Office and Civil Service.[210] As a result of the 1979 hearing, OPM issued a policy statement on sexual harassment for federal government employees and the Merit Systems Protection Board undertook an empirical study of sexual harassment. The OFCCP proposed regulations on sexual harassment, although they were more limited than the EEOC regulations.[211] There was an established federal interest in addressing the issue.

The Senate Labor and Human Resources Committee, chaired by Republican Orrin Hatch, held two hearings in 1981.[212] Clay Smith testified as Acting Chair of the EEOC and defended the Guidelines. He noted that the 1979 Post Office Committee hearings "established that sexual harassment was widespread in the Federal Government and established the need for guidance from our Commission" and that the EEOC then decided it would be appropriate to address across the workforce.[213] He described the "high degree of favorable response" in the 168 responses and comments to the proposed interim guidelines. At that hearing, comments submitted into the record were overwhelmingly from women's and labor groups. Phyllis Schlafly submitted a statement on behalf of the Eagle Forum. There were no comments by business or employer groups in the record.

STRUCTURAL CONSTRAINTS ON THE *MERITOR* DECISION

In 1986, when the Supreme Court took up the issue at last, a series of factors were already determined. The appellate courts had ruled unanimously in favor, in largely unanimous opinions, and there were no real differences in the Circuits. The EEOC Guidelines were in place, and although the United States did intervene on behalf of the employer, showing that Republican politics were not completely removed from the equation, the Solicitor General was forced to defend the Guidelines and argue about their application. Proponents had marshalled an extensive array of amicus briefs. And although the Chamber of Commerce and the EEAC appeared as amici on behalf of the defendant, they had in large measure already conceded the battle by failing to show up earlier.

---

[210] 96th Cong., 2d Sess, *Sexual Harassment in the Federal Government* No. 96-11, 1980.

[211] 44 F.R. 77006 (Dec. 28, 1979) (no hostile work environment, limited to "sexual favors" and "sexual advances")

[212] Hearings before the U.S. Senate Committee on Labor and Human Resources (97th Cong., 1st Sess., Jan. 28 and April 21, 1981), *Examination of Issues Affecting Women in Our Nation's Labor Force*: *Sex Discrimination in the Workplace* (1981).

[213] *Id.* at 337.

While the women's organizations had mobilized, the opposition had not. This failure to engage began with the effort to submit comments to the Guidelines, where favorable comments outran unfavorable comments by a large margin. It continued with the Congressional hearing record. And it is most dramatically reflected in the differences in amicus curiae participation in the appellate courts. Organizations were also working together, building a network that enaged in multiple fora.[214]

Nowhere is the limit on conservative political activism in this area more clear than in an EEOC Annual Report covering Fiscal Years 1986, 1987 and 1988. In his "letter" at the front of the report, Chairman Thomas made a point of discussing the agency's participating in *Meritor v. Vinson.* Thomas proudly noted that "The U.S. Supreme Court adopted the arguments presented by EEOC and the Justice Department as *amicus curiae*" that hostile work environment was a form of sex discrimination under Title VII.[215] The Chairman's statement does not mention that the brief was filed on behalf of the defendant. Instead it takes credit for the Supreme Court adopting a pro-civil rights ruling.

These differences in organizational engagement, and in the political salience of support versus opposition, may have been very important to the ability of sexual harassment law to survive the critical period of the early 1980's when it came under review. Those differences may also have helped before the courts. In the next chapter I formally test the effects of organizational support and political factors on the development of law.

[214] Even as early as the 1980 comments on the Sexual Harassment Guidelines there is evidence of organization, including comments submitted on behalf of multiple organizations or comments where one organization sends a letter joining or adopting another organization's comments.

[215] U.S. EEOC Combined Annual Report, FY 1986, 1987, 1988 at 9, EEOC Archives.

CHAPTER 4: LAW, POLITICS AND SOCIAL CHANGE

ABSTRACT

This chapter asks how much legal rules and norms explain the trajectory of sexual harassment claims, and uses this case to add to current public law debates over a legal model of courts on the one hand and a judicial politics model on the other. I use quantitative analysis to study the relevance of traditional measures of judicial politics, case-specific factors, and potential measures of law, with respect to the establishment of new sexual harassment legal claims and defenses. Data for the analysis come from the coding of appellate cases. Two models – a test of factors relevant to case outcomes and another of factors relevant to case citations and the structure of the legal network – together point to four basic conclusions: (1) the underlying legal rules applicable to sexual harassment remained extremely stable despite national political changes from liberal to conservative over the time period; (2) there is evidence that efforts by proponents to "play for rules" paid off; (3) *ceterus paribus,* partisan political measures nevertheless have a clear correlation with individual case outcomes, particularly after 1986; (4) the "settling" of the legal rule permanently embedded liberal policy preferences within the law while marking the point at which we see more politicized case outcomes. This suggests both the potential and limits of pursuing social change through law.

Tracing this record of political changes, legal results, and activist organizing in the development of sexual harassment law through the prior chapters seems to only reinforce the original puzzle at the start of this project. The major partisan political shift that occurred in 1981 appears to have little effect on the level or effect of the feminist legal innovation applying Title VII to workplace harassment. In reviewing the caselaw, plaintiffs overwhelmingly prevailed at the appellate level and before the Supreme Court in establishing and defending the core legal framework that exists today. The prior chapter showed the differences in organization and engagement between proponents and opponents in pursuing and defending favorable legal rules, and the results they consequently obtained in establishing precedents and securing and defending government regulations. This chapter seeks to determine whether and how that effort to "play for rules" ultimately mattered in individual decisions.

Existing theory provides no clear answer. It seems self-evident that if the objective is to win court decisions, rules that favor your side should be a resource in that effort. However, it turns out to be empirically a fairly complicated matter to determine whether and how law matters – even to judicial outcomes. Legal scholars over the decades have proffered numerous theoretical, normative and empirical claims about the precedential legal reasoning framework of *stare decisis,* and the interaction between legal doctrine, judicial process and case outcomes. More recently, political scientists have tested some basic premises of the traditional legal model and found it lacking in critical respects. This case presents a unique opportunity to compare these competing frameworks on a set of cases addressing a single legal issue over a

time period with both substantial ideological variation likely to influence judicial decisionmakers and a relatively unambiguous and seemingly stable legal regime.

Stare decisis is a shorthand representation of a larger set of claims about institutional constraints on the development and application of legal doctrine. In the conventional account of legal precedent, courts determine what "the law" is by looking at a collected body of prior decisions. After applying that particular distillation to the facts of the case at hand, the court issues a ruling that in turn may shape outcomes by future courts. Even in the traditional legal model, this straightforward depiction comes with a host of additional complexities, tied to a court's position in a hierarchical structure, the relative level of factual congruence between the case at hand and prior decisions, and the possibilities of intervening legal or social change. The legal realist movement pointed to the myriad ways these ostensibly reason-based neutral decision rules exist within a larger framework of legal indeterminacy. Nevertheless, a post-realist and increasingly post-modern legal academy generally presumes that a path-dependent understanding of legal doctrine is empirically valid -- at least to some extent -- confining much of the debate to its resulting normative implications.

An increasing number of political scientists, interested in what predicts judicial decisions, have performed empirical studies challenging and confirming various aspects of the traditional legal model of *stare decisis*. One of the most robust findings coming out of this research is that judicial ideology is an important predictor of who wins and who loses in court. This finding comes with a number of caveats and nuances that potentially leave central aspects of the legal model standing, and a host of interesting unanswered questions. Nevertheless, empirical research has shown how a core claim of *stare decisis* – that prior rulings are a set of neutral constraints on legal outcomes – may not be taken at face value. That in turn has yielded a set of emerging hybrid accounts, and a new interest in applying network analysis techniques, to explore further how precedential legal reasoning operates in practice.

Quantitative analysis of all the appellate decisions between 1977 and 1991 using both logistic regression and network analysis techniques supports the operation of both models in this case. I empirically identify evidence that the legal norm of following precedent -- *stare decisis* – operates in this area as legal scholars expect and appears to produce some results contrary to what political models predict. At the same time, I also see evidence that a partisan political shift from liberal to conservative in national politics and on the bench is linked to clear differences in case outcomes, especially after the Supreme Court's decision in 1986. Thus I conclude that proponents who successfully "played for rules" in their favor got the benefit both in terms of favorable outcomes and the creation of a very strong legal norm treating workplace harassment as sex discrimination. I also conclude that President Reagan's appointment of conservative judges -- presumably in hopes that they would limit regulatory burdens on employers -- does ultimately seem to have a negative impact on plaintiffs who litigated sexual harassment appeals in federal court.

One possible explanation is that the operation of legal norms may act to amplify political preferences and not just to constrain or mediate them. Here, the settling of the underlying legal rule itself shifted the terrain of contention to the scope and application of defenses -- ground less favorable to plaintiffs and more amenable to conservative ideological preferences.

Further, lag and cyclical effects basic to the operation of a precedential legal system both likely delayed retrenchment and made it less visible in legal rules terms. Finally, this result is consistent with theories about the "shadow" effects of a clear legal rule on what kind of cases get litigated instead of bargained to settlement. As explained in the concluding chapter, this case study about one area of the law, if it holds to other contexts, has the potential to expand the theoretical framework toward a richer and more integrated conception of both "law" and "politics."

THE LEGAL MODEL

The classic model of social change litigation in the U.S. – finding and supporting "test cases," filing amicus briefs, mobilizing media attention, and applying external political pressure – requires at some level a belief in the operation of *stare decisis.* The extended effort to get courts to issue favorable rules assumes that those rulings in turn will bind future courts facing the same issue. At the same time it assumes that courts have the power to **not** be bound by and will in fact override existing legislative or executive or prior judicial determinations. And then it assumes that these new rulings overturning or revising prior precedents – that racial segregation is unconstitutional,[216] that the state of Virginia may not limit admission to its military academy based on gender[217] – will hold against future challenge. In this case, advocates consistently argued that proper application of existing legal principles and prior precedents required concluding sexual harassment violated Title VII, relying on the basic framework of *stare decisis* to resolve the issue in their favor.[218]

Stare decisis is the practice of following legal precedent. Classic legal models posit a formal and neutral reasoning process, where judges consider specific facts in light of textual mandates, either statutory or common law, under generally accepted principles of interpretation. In the conventional interpretation, deference to precedent structures adjudication of law and fact. Looking to prior judicial decisions establishes the parameters of textual mandates and delineates the relevance of facts to outcome. In theory, this system results in perfect path-dependence, but even in its ideal type, substantial opportunities for divergence exist. In most modern incarnations, the legal model holds that *stare decisis* plays a real part in judicial decisionmaking, while conceding elements of the realist indeterminacy critique.[219]

---

[216] *Brown v. Board of Education,* 347 U.S. 483 (1954).

[217] *United States v. Virginia, et al,* 515 U.S. 519 (1996).

[218] *See supra* Chapter 2.

[219] As Tiller and Cross explain, "Legal academics' views of doctrine have evolved . . . . The legal view increasingly recognizes that the law is not everything, but insists that it is still something important." Tiller and Cross, *supra* note 8 at 519.

The idea of precedent is not unique to the legal system, but in law its role is not merely justification but constraint. Looking to past actions to justify present actions or inactions appears in contexts as diverse as the family and bureaucratic politics:[220]

> Think of the child who insists that he should not have to wear short pants to school because his older brother was allowed to wear long pants when he was seven. Or think of the bureaucrat who responds to the supplicant for special consideration by saying that 'we've never done it that way before.' In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again.[221]

Thus consistency bolsters legitimacy by promoting the appearance of fairness, explaining the decisions of a powerholder as based on a historic course of conduct, rather than arbitrarily adopted for the case at hand. The American common law tradition takes this a step further. Rather than simply making precedent available as one of a menu of potential justifications for an adjudicated outcome, *stare decisis* preferences past action above all. Since the "rule of law" requires clarity around what, exactly, the law is, requiring courts to follow precedent in the absence of an explicit statutory directive satisfies a core requirement of liberal democratic justice.

This mandate to follow prior decisions, however, includes a host of contingencies and complexities. For example, a prior precedent is "controlling" and formally constrains the outcome only when it originated in the same appellate court, or when an inferior court considers decisions of a superior court; otherwise it is typically considered "persuasive" rather than "controlling."[222] Precedent also requires factual congruence – a precedent may be "distinguished" and thereby disregarded if it fails to match factually the case at hand.[223] The distinction between a "holding" and "mere dicta" claims that only certain aspects of the past

---

[220] Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUMBIA LAW REVIEW 723 (1988); Frederick Schauer, *Precedent*, 39 STANFORD LAW REVIEW 571 (1987). Henry Black, author of *Black's Law Dictionary*, compared the concept of precedent used in politics from that used in law. In a political context, a precedent could be used to justify an action "on the theory that what was formerly done or allowed, without successful objection, may permissibly be repeated." By contrast, "in the science of case-law, the primary idea of a precedent is that of a rule judicially established and presumptively binding." Henry Campbell Black, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS (1912).

[221] Schauer, *supra* note 220.

[222] Black, *supra* note 220 at 9-10; Benjamin P. Friedman, *Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 EMORY LAW JOURNAL 647 (1993). As Friedman explains, "A court wants to be fully constrained only by those courts immediately superior to it while retaining great discretion in the decisions it must make. Thus, within the common law there is a struggle between retaining flexibility and respecting past decisions." *Id.* at 682.

[223] Black, *supra* note 220 at 60-63.

guide the present, and instructs a court to parse prior decisions with an eye to results, rather than rhetorical justification.[224] Nevertheless, courts frequently expend a great deal of effort analyzing the actual language of adjudication, or the larger principles a decision represents, and not just the specific result.[225] This is particularly true in situations calling for the application of persuasive authority, parsing of conflicting prior decisions, or translation of existing legal doctrine to new factual scenarios.[226]

For a concept grounded in path-dependence, it is perhaps surprising that a host of traditional formal rules as well as highly ritualized legal practices openly acknowledges the potential for doctrinal change. [227] Social and cultural change forces evolution – either adapting an old rule to a new world, or deciding that a new rule is needed. As an early twentieth century law treatise explains:

> In applying the maxim stare decisis, the courts should be influenced neither by excessive conservatism nor by extreme radicalism, but by moderation, right reason and good sense, having regard, on the one had, to the importance of keeping the law certain and stable, and, on the other hand, to its necessary development as a living and growing science.[228]

However, evolution of either sort typically occurs within the framework established by prior decisions.[229] Indeed, as Brian Tamanaha explains, the view that a perfectly structured and mechanistic formal law regime existed prior to advent of legal realism is not supported by the historical record.[230]

---

[224] Black, *supra* note 220 at 38-60; 76-179.

[225] Eric Maltz, *The Nature of Precedent*, 66 NORTH CAROLINA LAW REVIEW 367 (1988). See id. at 373-75. *See id.* at 373-75.

[226] *cf.* Friedman, *supra* note 222; Roscoe Pound, *What of Stare Decisis*, 10 FORDHAM LAW REVIEW 1 (1941).

[227] Under the traditional theory, departures from precedent could be justified in a variety of circumstances, *see* Black, *supra* note 220 at 203, including how widely it has been adopted, how much it has been relied upon, and how consistent or inconsistent it is with other principles.

[228] Black, *supra* note 220 at 218.

[229] *See* Maltz, *supra* note 225 at 383-84 (when courts "diverge from prior caselaw" to modify an existing rule or depart from it, "the force of precedent is such that judges generally wish to appear to be following a course consistent with prior caselaw"); Pound *supra* note 226 at 6-8. At least one scholar has posited something more akin to a "punctuated equilibrium" theory of doctrinal change. *See* Bruce Ackerman, WE THE PEOPLE: FOUNDATIONS (1991).

[230] Brian Z. Tamanaha, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010); Edward Rubin, *the Real Formalists, The Real Realists and What They Tell Us About Judicial Decisionmaking and Legal Education*, 109 MICHIGAN LAW REVIEW 863 (2011).

Perhaps the most well-known description of the operation of precedent is Ronald Dworkin's analogy of judging to writing a "chain novel."[231] In this account, each judge is an individual author, but linked to the larger literary enterprise of the common law. In fitting a particular ruling into the overall framework of the story, courts have a certain degree of liberty, but must operate within the constraints of what has been written before, and their contributions inevitably shape what follows.[232] In response to the realist critique, legal scholarship developed more nuanced and critical accounts of doctrinal development and judicial behavior. The legal academy has begun to concede neutrality and indeterminacy without forfeiting the claim that stare decisis explains the operation of legal process.[233] Dworkin's work is an example of this claim for constraint amidst uncertainty. In his writing, Dworkin presents a mixed empirical and normative claim, both asserting that this is how law operates, as well as how it maintains integrity and fulfills democratic values.

Indeed, a substantial focus of much modern legal scholarship on *stare decisis* is the normative implications of judicial reliance on precedent. Arguments in favor of precedent include stability, legitimacy, and decisional efficiency. [234] The argument for stability focuses on the predictive value of the rule of *stare decisis* and its effect on the internal coherence of doctrine.[235] As for legitimacy, while courts are anti-democratic political institutions, by adhering to a formal structure of precedent arbitrariness is reduced.[236] The requirement to

---

[231] Ronald Dworkin, LAW'S EMPIRE (1986).

[232] *Id.* at 228-258.

[233] Tiller & Cross, *supra* note 8 at 522; Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE LAW JOURNAL 2031 (1996); *id.* at 2035 ("stare decisis remains far more than a mere echo in our legal culture"); Friedman, *supra* ("The American judicial system strikes a middle ground by using the past constructively, but not exclusively"); Maltz, *supra* note 225 at 188.

[234] David Lyons, *Formal Justice and Judicial Precedent*, 38 VANDERBILT LAW REVIEW 495 (1985); Schauer, *supra* note 220; Peters, *supra* note 233.

[235] Black, *supra* note 220 at 184 ("The rule of stare decisis is based upon the importance of certainty and stability in the law").

[236] Maltz, *supra* note 225 at 371. Maltz expounds on the rule of law: "one of the most widely shared values in the American political system is that principles governing society should be 'rules of law and not merely the opinions of a small group of men who temporarily occupy high office.' The doctrine of stare decisis reinforces this value in two ways. First, it fosters the appearance of certainty and impartiality by providing a seemingly neutral source of authority to which judges can appeal in order to justify their decisions. Second, the influence of precedent works to limit the actual impact which any single judge (or a small group of judges) has on the shape of the law."

treat "like cases alike" enhances fairness to individual participants in the system. [237] Stare decisis thereby generates at least a "perception of impartiality" that serves to bolster judicial legitimacy.[238] *Stare decisis* protects the court against political attack, as it grounds the work of courts in neutral principles.[239] Finally, relying on prior precedents promotes decisional efficiency – judges do not have to revisit settled issues or repeat the work needed to reach a conclusion about the proper legal result.[240]

Although these normative questions are a matter of robust debate in legal scholarship, as are the implications of these principles for particular doctrinal outcomes, the empirical reality of judging based on precedent is rarely questioned. Some critical scholarship, including critical race theory and feminist legal theory, reinvigorates realist claims about the indeterminacy of legal text through the lens of post-modernism and the potential for ideologically-driven outcomes. However, these works frequently deploy traditional legal argument or seek to influence the path of doctrine.[241] *Stare decisis* remains a vital component of the contemporary legal model, in scholarship as well as practice.

---

[237] *But see* Maltz, *supra* note 225 at 369-70 (this justification more about retroactivity than precedential adjudication per se).

[238] Friedman, *supra* note 222 at 693.

[239] Peters, *supra* note 233.

[240] Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921). *See id.* at 149.

[241] For example, legal doctrine and even some traditional doctrinal analysis may coexist with narrative, policy, and critical theory in some of these works. *See, e.g.,* Derrick Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987). Mackinnon deployed feminist theory in the service of establishing new legal precedents. Mackinnon, *supra* note 14.

THE SOCIAL SCIENCE MODEL

With the advent of legal realism, a competing view of the legal process arose.[242] The realists presented a withering critique of the legal formalist claim that judicial outcomes relied solely on neutral, principled reasoning, decrying "the divorce of legal reasoning from questions of social fact and ethical value."[243] Legal realists largely rejected doctrine as an explanation for judicial decisionmaking, frequently concluding that legal precedent functioned largely to justify decisions made on other grounds.[244] This critique foreshadowed the argument of the contemporary scholars who disregard legal doctrine as an explanatory factor in empirical models.

The indeterminacy of legal language was crucial to this aspect of realist thinking about doctrine. While traditional models of *stare decisis* included contingencies, variants, choice and change, such nuances theoretically operated within a structure of formal and neutral legal reasoning.[245] Questioning this presumed neutrality of legal reasoning yielded the potential for discretion, manipulation and bias. Karl Llewellyn described realism as the "[d]istrust of traditional legal rules and concepts insofar as they purport to *describe* what either courts or people are actually doing."[246] Because this distrust goes "hand in hand" with "a distrust of the theory that traditional prescriptive rule formulations are *the* heavily operative factor in producing court decisions," court opinions were vulnerable to being post-hoc rationalizations.[247] Felix Cohen assailed the content of typical legal reasoning as "transcendental nonsense," artificially removed from empirical reality:

> [J]udges and lawyers . . . should recognize that the traditional language of argument and opinion neither explains nor justifies court decisions. When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of

---

[242] *See, e.g.,* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 34 COLUMBIA LAW REVIEW 809 (1935); Karl N. Llewellyn*, Some Realism About Realism -- Responding to Dean Pound*, 44 HARVARD LAW REVIEW 697 (1931).

[243] Cohen, *supra* note 242 at 814.

[244] Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUMBIA LAW REVIEW 1138 (1999).

[245] *But see* Tamanaha, Rubin, *supra* note 230.

[246] Llewellyn, *supra* note 242 at 1237.

[247] *Id.*; *see also id.* at 1238-39 (viewing judicial opinions as "trained lawyers' arguments made by the judges (after the decision has been reached), intended to make the decision seem plausible, legally decent, legally right, to make it seem, indeed, legally inevitable").

> the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.[248]

By suggesting that judges operated within a path-dependent set of constraints, legal formalism blinded ordinary citizens to the ways in which courts protect established economic arrangements and perpetuated existing inequality.[249] Thus, realists turned from doctrine to social science as a basis for thinking about law.[250]

While the realist challenge at its most radical would dismiss *stare decisis* as mere window dressing on judicial legislating, some of those typically associated with a legal realist critique left room for a path-dependent legal system. For example, Benjamin Cardozo, while advocating for an empirical understanding of law, which incorporated social welfare concerns, also argued that precedent can and should play an important role in judicial decisionmaking, by promoting fairness and rationality and reducing arbitrariness.[251] Lawrence Friedman characterized the realists as "limited rule skeptics," seeking not to exclude the functioning of rules or preclude underlying stability in the legal regime, but to understand the forces at work in the areas of uncertainty.[252] Indeed, as is true of their modern scholarly descendants, the line between a realist, "political" model of judging and a rule-based precedential framework is less clear in practice.[253]

Decades after legal realism pressed for a social scientific understanding of how law works, and promoted the theory that forces other than legal doctrine must be at play, a body of political science literature set out to test that case. These social scientists hypothesized that exogenous factors, most prominently ideology, must explain legal outcomes.[254] The realists

---

[248] Cohen, note 242 *supra*.

[249] *See, e.g.,* Llewellyn, *supra* note 242; Cohen, *supra* note 242 at 815 ("The vicious cycle inherent in this reasoning is plain. It purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends on the extent to which it will be legally protected."); *id.* at 840 ("It is the great disservice of the classical conception of law that it hides from judicial eyes the ethical character of every judicial question, and thus serves to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy").

[250] Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AMERICAN UNIVERSITY LAW REVIEW 1 (1999).

[251] *See generally,* Cardozo, *supra* note 240.

[252] Lawrence Friedman, *Legal Rules and the Process of Social Change,* 19 STANFORD L. REV. 786 (1967).

[253] Tamanaha, Rubin, *supra* note 230.

[254] Some research has considered additonal exogenous factors, such as judicial background, Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE LAW JOURNAL 1759 (2005), or litigant status.

took the indeterminacy of legal language as an important building block of their theory. Their positivist heirs viewed it as incapable of analysis within a framework of falsifiable hypotheses and therefore of marginal empirical interest. The numerous complexities of the traditional legal model entered their models solely as noise, remaining unexplained variation, or the absence of political behavior.

One consistent finding of the political science literature on judging, particularly the so-called attitudinal model pioneered by Jeffrey Segal and Harold Spaeth, is that ideology is a substantial factor predicting Supreme Court outcomes.[255] While the evidence of the effect of ideology on lower courts is more mixed, some studies similarly reject precedent in favor of politics as an explanatory variable for judicial outcomes.[256] Thus, empirical evidence casts substantial doubt on the key premise that doctrinal analysis provides a neutral and principled framework for judging, although the empirical case is most well-documented in the Supreme Court – perhaps the place one is likeliest to find political variables at play.

In fact, some empirical evidence supports the operation of the model, particularly with regard to lower courts. Some studies demonstrate that lower courts follow the Supreme Court's pronouncements of what the law is in certain circumstances,[257] or at least that ideology may not predict outcomes for lower courts, supporting the legal model by implication.[258] Some research finds effects both of legal doctrine and judicial ideology.[259] One recent study attempts to test the "chain novel" theory, concluding that consistent with the model, ideology had a greater effect on cases of first impression.[260] In immediately subsequent rulings, the effect of precedent is stable or increasing, but as more decisions in a particular area of law accumulate, ideology plays an increased role in outcomes – presumably because precedents begin to diverge, opening up the potential for discretionary selections of authority to advance particular policy goals. Richards and Kritzer have developed a quantitative model to test the change from one "rule regime" to another.[261]

---

[255] Segel and Spaeth, *supra* note 27; Martin, et al, *supra* note 27; Spaeth and Segal, *supra* note 27.

[256] Donald R. Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Court of Appeals*, 26 AMERICAN JOURNAL OF POLITICAL SCIENCE 225 (1982); Sunstein, et al, *supra* note 27.

[257] Baum, *supra* note 27; John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 THE WESTERN POLITICAL QUARTERLY 502 (1980).

[258] Ashenfelter, *supra* note 27.

[259] Cross, *supra* note 48; Songer, et al, *supra* note 28; Songer and Haire, *supra* note 48.

[260] Lindquist and Cross, *supra* note 48.

[261] Mark J. Richards and Herbert M. Kritzer, *Taking and Testing Jurisprudential Regimes Seriously: A Response to Lax and Rader*, 72 JOURNAL OF POLITICS 285 (2010); Mark J. Richards and

There are also theoretical accounts of political judging in the public law literature that treat the legal framework instrumentally – as part of the apparatus of judicial power. But the exercise of that power is not in service of neutral rule-bound framework. Perhaps the most well-known is Martin Shapiro's work on a universal model of judicial decisionmaking in the service of dominant political regimes.[262] Like the behavioralist social scientists testing for empirical evidence of politics, Shapiro challenges a model of judicial independence from politics as contrary to fact, by building from first principles of dispute resolution to a full-realized theory of courts and the state.

At the end of the day, there is no clear consensus about whether *stare decisis* constrains the American judiciary.[263] Although existing research supports certain reasonable conclusions about the level of constraint in federal courts, such as the differences between findings regarding the Supreme Court as compared with lower courts, the effect of ideology cannot be dismissed at any level. However, most studies do not explicitly model law or operationalize doctrine – the absence of an ideological effect is considered evidence that precedent must control the outcome. Thus even studies that appear to find support for the legal model fall far short of documenting a path dependent explanation of judging.

Critics, particularly from the legal academy, argue that these studies "attack a model of the law that simply does not exist."[264] They view the positivist null hypothesis – that judges mechanically apply a specifically delimited set of legal factors -- as a straw person stand-in for law (although this view risks the corresponding oversimplification of the political model). The modeling of legal reasoning as perfectly path dependent does not comport with how contemporary legal scholars understand precedential reasoning in light of the realist indeterminacy critique and the complexities of even a traditional legal account. Thus, rejection of the null hypothesis in favor of ideological factors may not be particularly meaningful.

Existing quantitative research on courts and judging disregards the effects of doctrine in part because of the practical reality of the difficulty in coding doctrinal developments. The simple yes/no or liberal/conservative binary scales are conducive to large scale statistical assessments in a way that the more fluid, nuanced considerations of the impact of doctrine may not be. However, in the words of prominent critics, this "decision to ignore opinions

---

Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decisionmaking,* 96 AMERICAN POLITICAL SCIENCE REVIEW 305 (2002).

[262] Martin Shapiro, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

[263] Epstein & Knight, *supra* note 8 at 184-86 (all three possible positions on whether precedent matters – a lot, some or none – have logical merit and empirical support).

[264] Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 UNIV. OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 903 (2005).

misses the law."[265] In truth, the attitudinal model cannot account for the content, or even the existence, of judicial opinions.[266]

EMERGING HYBRID ACCOUNTS

Building on these critiques, a few scholars have begun to attack the dichotomy between the legal and social science models of *stare decisis*. For example, Emerson Tiller and Frank Cross argue strenuously for a re-examination of the role of legal doctrine in the judicial process, as "the nature and effect of legal doctrine has been woefully understudied." Studies in political science and accounts in the legal literature continue to essentially talk past each other, and "neither has effectively come to grips with the descriptive meaning of legal doctrine."[267] Hybrid accounts arguing for the relevance of both the legal model and social science findings properly challenge shortcomings in both the legal and social science models.

Some emerging critiques of these two bodies of literature bring institutional factors to bear on explaining the role of doctrine in process of judging. This is one of the few places where a contemporary law and society perspective has made some contributions to the debate.[268] Two strands of thinking appear particularly prominent in modeling judges as individuals operating within larger institutional frameworks – one looking at judges as strategic political actors, another as role players.

The first set of critiques applies insights from law and economics or positive political theory to consider how strategic pressures and efficiency considerations may lead judges as rational maximizers to rely on precedent.[269] For example, Lee Epstein and Jack Knight theorize that a "norm of stare decisis" constrains judges from acting on sincere policy preferences, and instead causes them to strategically modify their positions to reflect stated doctrine and avoid political sanction. Thus the concession to law protects the legitimacy of the decisions they reach, which are as close as possible to their desired policy outcome.[270] In this view, law remains an independent and exogenous force operating within a larger political framework.

A second approach asks how judges make decisions in light of their role in the larger institutional structure of courts. Judges seeking to be perceived as holding a culturally defined role of "judge" will act in ways that reinforce their status. Edward Rubin and Malcom Feeley

---

[265] Tiller & Cross, *supra* note 8 at 523.

[266] Gerhardt, *supra* note 264 at 913.

[267] Tiller & Cross, *supra* note 8 at 517.

[268] Howard Gillman, *What's Law Got To Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decisionmaking*, 26 LAW & SOCIAL INQUIRY 465 (2001).

[269] Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 NORTH CAROLINA LAW REVIEW 643 (2000).

[270] Epstein and Knight, *supra* note 8.

look at how this dynamic constrains the ability of courts to be political actors.[271] Motivations of individual judges interact with institutional context to produce legal doctrine. When attitude and doctrine conflict, judges will make efforts at "integration" to resolve the conflict.[272] Martin Shapiro and Alex Stone Sweet argue that although judging is inherently a political act, the institutional structure of courts channels ideological decisionmaking in particular directions.[273] As the authors explain, "It is true that judges do camouflage political actions in legal discourse, but – more than many political jurisprudence investigators have been willing to admit – the need for camouflage and the belief in camouflage to some degree determine the agendas and substance of political choices."[274] Baum considers the personal motivations of judges and how the external "audience" for court decisions plays a role in their decisions.[275]

Some political scientists have begun exploring the use of network analysis as a way to model the effects of law and legal norms. Network analysis techniques are widely used in diverse fields to conduct empirical analysis of the distrbution of and characteristics of relationship ties between individuals or entities.[276] Networks have been used to understand the diffusion of ideas and innovation[277] and to explain the work of social movement organizations.[278] Building from the literature on citation networks of all kinds,[279] political

---

[271] Edward Rubin and Malcolm Feeley, *Creating Legal Doctrine,* 69 SOUTHERN CALIFORNIA LAW REVIEW 1989 (1996).

[272] Rubin & Feeley, *supra* note 271 at 2006-07.

[273] Shapiro and Stone Sweet, *supra* note 44.

[274] Shapiro and Stone Sweet, *supra* note 44 at 8. Indeed, Shapiro describes precedent as an incremental change process not unique to courts but rather "common to all policymakers" and as a generic process predicted by organization theory. *Id.* at 91. 94-95, 107. In a similar vein, Michael Gerhardt posits "the limited path dependency of precedent," contending that research on judicial outcomes fails to take into consideration the institutional context of judging. For example, precedent's functions as a modality of argument and in setting judicial agendas are significant factors unaddressed by existing positivist research. Gerhardt, *supra* note 264 at 968-973. Further, precedent shapes interactions between courts, other branches of government, and the larger society by structuring the terms of debate and serving as a "source of constitutional meaning." *Id.* at 992.

[275] Lawrence Baum, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

[276] Peter J. Carrington, John Scott, Stanley Wasserman, MODELS AND METHODS IN SOCIAL NETWORK ANALYSIS (2005); Stanley Wasserman and Katherine Faust, SOCIAL NETWORK ANALYSIS: METHODS AND APPLICATIONS (1994).

[277] Christopher van den Bulte and Gary L. Lillien, *Medical Innovation Revisited: Social Contagion versus Marketing Effort*, 106 AMERICAN JOURNAL OF SOCIOLOGY 1409 (2001).

[278] Diani and McAdam, *supra* note 41; David Strang and Sarah A. Soule, *Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills*, 24 ANNUAL REVIEW OF SOCIOLOGY 265 (1998).

scientists have built and analyzed network datasets of Supreme Court precedents, identifying factors in the network,[280] while others have analyzed appellate decisions[281] or hiring practices of U.S. law schools.[282]

The concept of law as an interconnected network offers an alternative empirical framework to test the operation of these models, but it also offers an alternative theoretical lens as well. Networks assume path dependence and constraint of certain kinds, and indeed the classic legal model fits the branches and paths of a network quite closely. But network theory also assumes that "influences" play a critical role in the development and shape of the network. Politics, legal norms, and indeed litigants can all be influences in a network of law and, if they are, should appear in the network structure.

DATA AND METHODOLOGY

To examine these issues quantitatively, I gathered, coded and analyzed all of the appellate decisions in federal court between 1977 (the first appellate decision) through December of 1991, and applied two different modes of analysis. The first uses a conventional logit regression with case outcome as a dependent measure – the same basic approach as the attitudinal studies discussed above. The second uses network analysis techniques, a well-established method in a variety of disciplines that is only recently being applied to the study of judicial citations. I then further refine and test the network results through additional regression analysis. More details on the exact models and tests used are set forth below.

I assembled the list of cases in the analysis from a variety of sources. I began with an existing database of appellate cases on sexual harassment compiled by Sean Farhang at the University of California for another study, developed based on search terms.[283] I added cases I could identify as missing because they were cited in other cases or mentioned in the literature.

---

[279] Lowell L. Hargens, *Using the Literature: Reference Networks, Reference Contexts, and the Social Structure of Scholarship*, 65 AMERICAN SOCIOLOGICAL REVIEW 846 (2000).

[280] Cross, et al, Fowler, et al, *supra* note 50; Michael J. Bommarito, Daniel Martin Katz, Jon Zeiner, James H. Fowler, *Distance Measures for Dynamic Citation Networks,* 390 PHYSICA A (2010); Ryan C. Black, James F. Spriggs, *The Depreciation of Precedent on the U.S. Supreme Court*, (2011), Draft Paper available at http://polisci.wustl.edu/files/polisci/black_spriggs_depreciation.pdf (last visited July 3, 2011).

[281] Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions? A Statistical Analysis*, 70 MARYLAND LAW REVIEW 101 (2010).

[282] Daniel Katz, et al, *Reproduction of Hierarchy? A Social Network Analysis of the American Law School Professoriate*, 60 JOURNAL OF LEGAL EDUCATION ___ (2001) (forthcoming).

[283] The search used to create this database was SY, DI(SEX! /5 HARASS!) (HOSTILE /5 ENVIRONMENT) (WOM! /5 HARASS!) (FEM! /5 HARASS) (MALE /5 HARASS!) (MEN /5 HARASS!) (GEN! /5 HARASS!), which searched the summary and digest fields for relevant text.

I removed cases that were unrelated to the development of legal rules involving sexual harassment claims.[284] A full list of all the appellate cases in the analysis is attached as Appendix 1.

This study looks only at cases filed in federal appellate courts, which limits the conclusions that can be drawn from the results. It does not include claims that were settled, litigated but not appealed, or litigated in state courts or purely administrative proceedings.[285] One of the possible biases in this selection is with respect to the conclusion that the results for plaintiffs changed markedly after 1986 -- very likely due in part to a change in the mix of cases and issues that were pursued on appeal. However, since my interest is primarily in understanding changes in legal rules that apply to claims under a federal statute, and federal appellate courts are the primary place where that issue is contested, it is appropriate to use data collected from those decisions to test the operation of legal, political and case specific variables. Further, since part of my research question involves the effect of national level political changes involving the federal government, looking to federal courts is more likely to reveal the effect of those changes.[286]

After collecting and refining the universe of cases, I coded them to collect as many case-specific factors that might be relevant to the analysis as possible. In addition to basic information such as Circuit and Year, I also coded the presence of organizational or government plaintiffs or amici, the procedural posture, who won in the District Court, and the Court of Appeals,[287] and the major legal issues and claims and defenses addressed in the decision. I coded each judicial vote individually (although the vast majority of the cases were unanimous

---

[284] This included a relatively small number of cases litigating purely procedural issues like exhaustion, immunity, and others without addressing any legal issues or sexual harassment claims or defenses directly. Cases where procedural issues were raised along with substantive claims remained in the analysis.

[285] In theory my universe of cases includes unpublished decisions as it was gathered using Westlaw and Lexis searches. However, since data collection and publication practices varied significantly during this time period, I do not know if the fact that I have no unpublished opinions means there were none, or that those opinions are missing. Again, though, those decisions should not be as significant to asking about the development and operation of legal rules.

[286] There is limited data to determine how much state court litigation of sexual harassment claims occurred during this time period. However, the clear focus of activists and organizational litigants was the federal courts.

[287] I coded outcomes originally to allow for mixed results, however there were actually only a handful of cases not clearly plaintiff or defendant wins after the first review, and upon further review they could all be reasonably assigned either a 1 for plaintiff win or a 0 for defendant win.

decisions).[288] I then set up two versions of the dataset, one allowing me to analyze vote by vote (n=214) and one allowing me to analyze case by case (n=72).[289]

Time is an important variable in the analysis. It is capturing some of the external political and social changes in the political opportunity structure taking place over the period of analysis, and it is strongly correlated with decreasing win rates for plaintiffs and increasing conservatism of the deciding judges. In addition there is an important event date – the Supreme Court's ruling in 1986. After coding the date of each decision, I also converted that to two specific measures – one for elapsed year (each year elapsed between 1977 and 1991) and one for cases decided before and after *Meritor.*

To this data I added relevant information about each judge obtained from external databases. I used the Federal Judicial Center's online biographical directory of federal judges[290] to code the appointing President and his party.[291] I used the Giles Hettinger Pepper ideology scores commonly used for partisan analysis of the federal Courts of Appeal (GHP Scores).[292] After hand-coding who the deciding judges were in each case, I matched that to the external databases to capture both party and score data for each judge. For the case by case analysis, I converted that to capture an average panel ideology score.

I then collected a third set of data to test the use of law in the decisions – specifically the extent to which cases cited or relied on other cases and regulations. For each case I coded some specific markers of law: whether the court cited or relied on the 1980 EEOC guidelines, whether the case cited the *Meritor* decision, and whether the case involves a "race bridge"[293] (citing to and relying on anti-discrimination principles developed in prior race discrimination cases). I also coded and experimented with various ways of testing the legal issues raised in the case, settling on some specific indicators of legal-based decisionmaking, including citing key cases, adjudicating specific issues, and what claims and defenses were raised.

Finally, I then created a complete dataset for purposes of the network analysis. My network is the universe of all appellate cases that cite other sexual harassment cases during the

---

[288] There were 7 dissents and 8 concurrences in the 72 decisions, and no *en banc* rulings.

[289] In the original round of coding I collected a substantial amount of additional data that did not make it into the final analysis, because it ended up being too difficult to code consistently or not being relevant to any results. This included reviewing all the plaintiffs and attorneys for repeat players (virtually none found), and attempting to capture framing in the opinions (very little variation found).

[290] Available at http://www.fjc.gov/public/home.nsf/hisj.

[291] In the case of judges who were originally appointed as District Judge or later became Supreme Court Justices, I used the President who originally appointed or elevated that judge to the Court of Appeals.

[292] *See* Giles, et al, *supra* note 64.

[293] Feely, Fuller *supra* note 170.

time period 1977 to 1991. The “edge list” is the list of all pairs of cases in the network that contain a citation link. This is a directed network, as earlier cases cannot cite to later cases. Each case is a node in the network, and there are attributes of that case (including year, Circuit, and outcome) as well as other atttributes that might be influencing outcomes (such as whether there was an governmental plaintiff or an organization involved as an amicus, whether the case involved a “race bridge” and whether the case was decided by a majority Democratic panel.

Appendix 3 contains a complete list of all the variables used in the analysis, their values and source.

RESULTS OF THE NETWORK ANALYSIS

The first step in the analysis involved using the network data to identify the most significant cases and what factors were linked to increasing prominence in the network. I used two common measures of importance that are the most relevant for considering a legal citation network – "in degree" (how many other cases cited that case) and "eigenvector centrality" (a reflection of how central a case is taking into account all the distances in the network). Then using both visualization and calculation of network values I incorporated key attributes of interest: the partisan composition of the panel, whether a government or organizational actor was a plaintiff or amicus, whether the case involved a "race bridge," and whether the winner was a plaintiff or defendant. I used gephi open source software to do the visualizations and calculations for the network data.[294]

Figure 4 shows the differences in citation rates for the cases in the network. Node size and color (darker from orange to red) are used to indicate relative indegree counts. The cases most frequently cited by other cases will have the highest indegree counts. Notice that the Supreme Court ruling in *Meritor* is, unsurprisingly, the largest case, as well as highly central to the network. Other visually prominent cases are mainly the early decisions regarding the existence and scope of the right to be free from sexual harassment at work.

[294] http://www.gephi.com.

Figure 4: Nodes Ranked by InDegree

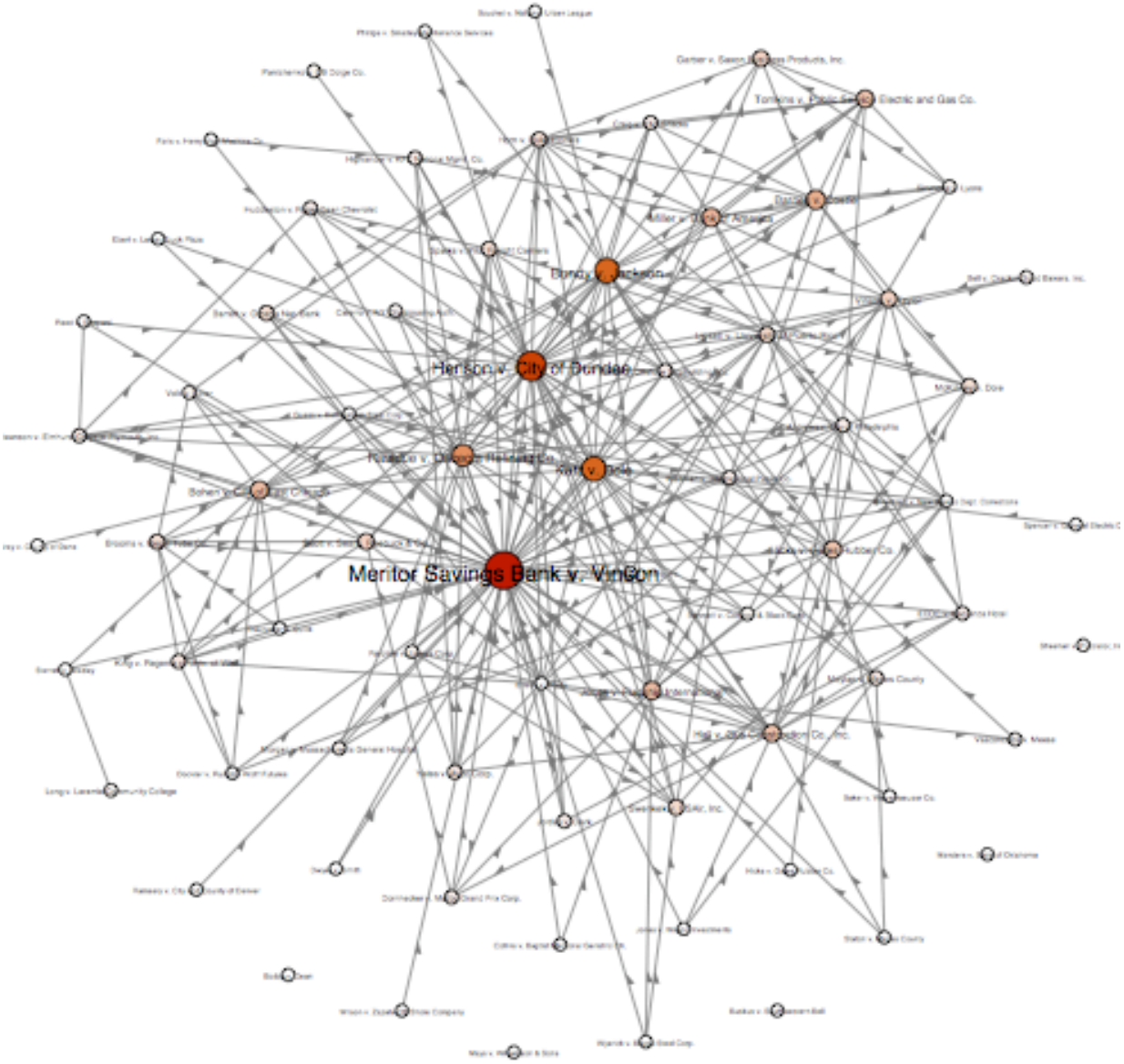
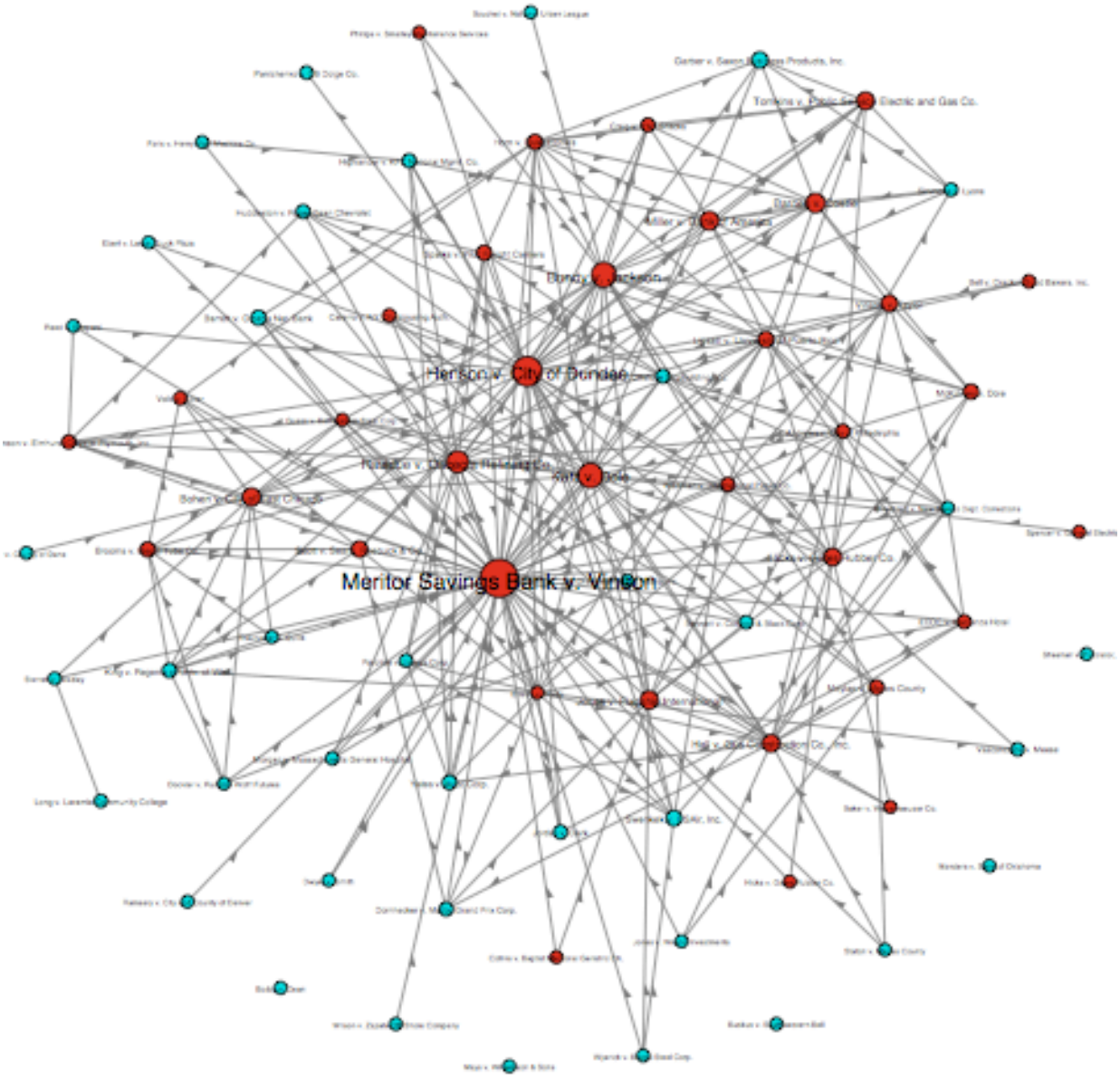


Figure 5 uses the same display of node size to represent indegree, but takes into consideration one of the variables of interest, the presence of citations to race discrimination precedents. In this case, red indicates the use of a race bridge, blue indicates the case does not explicitly draw on prior race discrimination precedents. Those cases appear from the visualization to be more frequently cited, and also more central to the network – further suggesting that existing race discrimination law was a building block for these plaintiffs and in turn for the larger body of precedent.

Figure 5: **Race Bridge Cases in the Network**

Red nodes represent race bridge cases, blue nodes all other cases



In Figure 6, the variable of interest is ideology, as measured by whether the panel was majority Democratic, majority Republican or split. Here blue represents Democratic panels, red Republican panels. More Republican majority panel cases appear to be on the periphery of the network, and more Democratic majority panels appear to be "making law" in terms of generating highly cited cases, although that could be a function of time. (Cases later in the dataset are more likely to be decided by Republican panels and there is less opportunity for them to be cited by other cases than for older cases). Non-unanimous opinions are extremely rare in this dataset, making the observed behavior of ideologically split panels similar to all other panels.

Figure 6: **Democratic or Republican Panels in the Network**

Red nodes represent cases decided by Republican majority panels, blue nodes cases decided by Democratic majority panels.

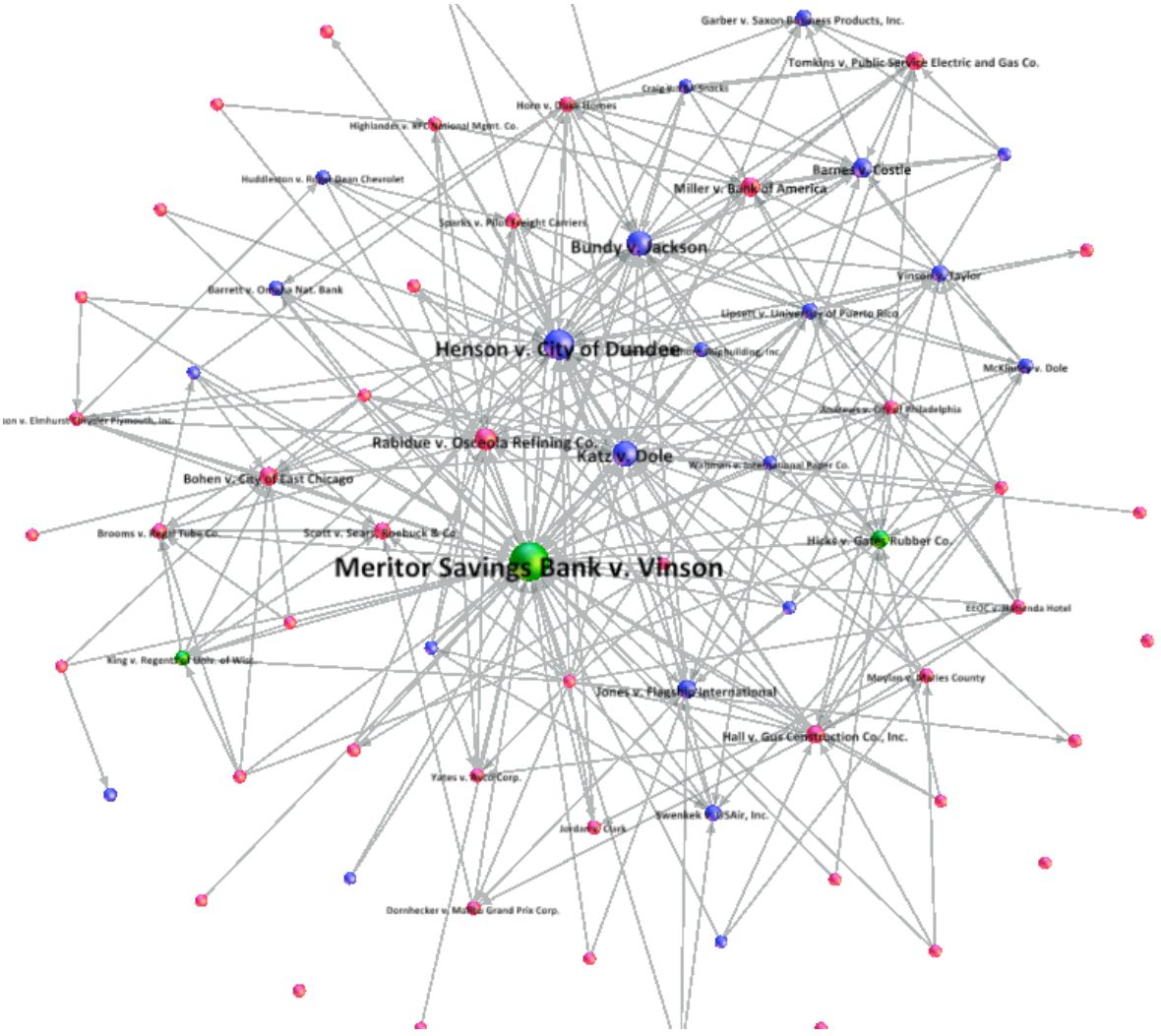
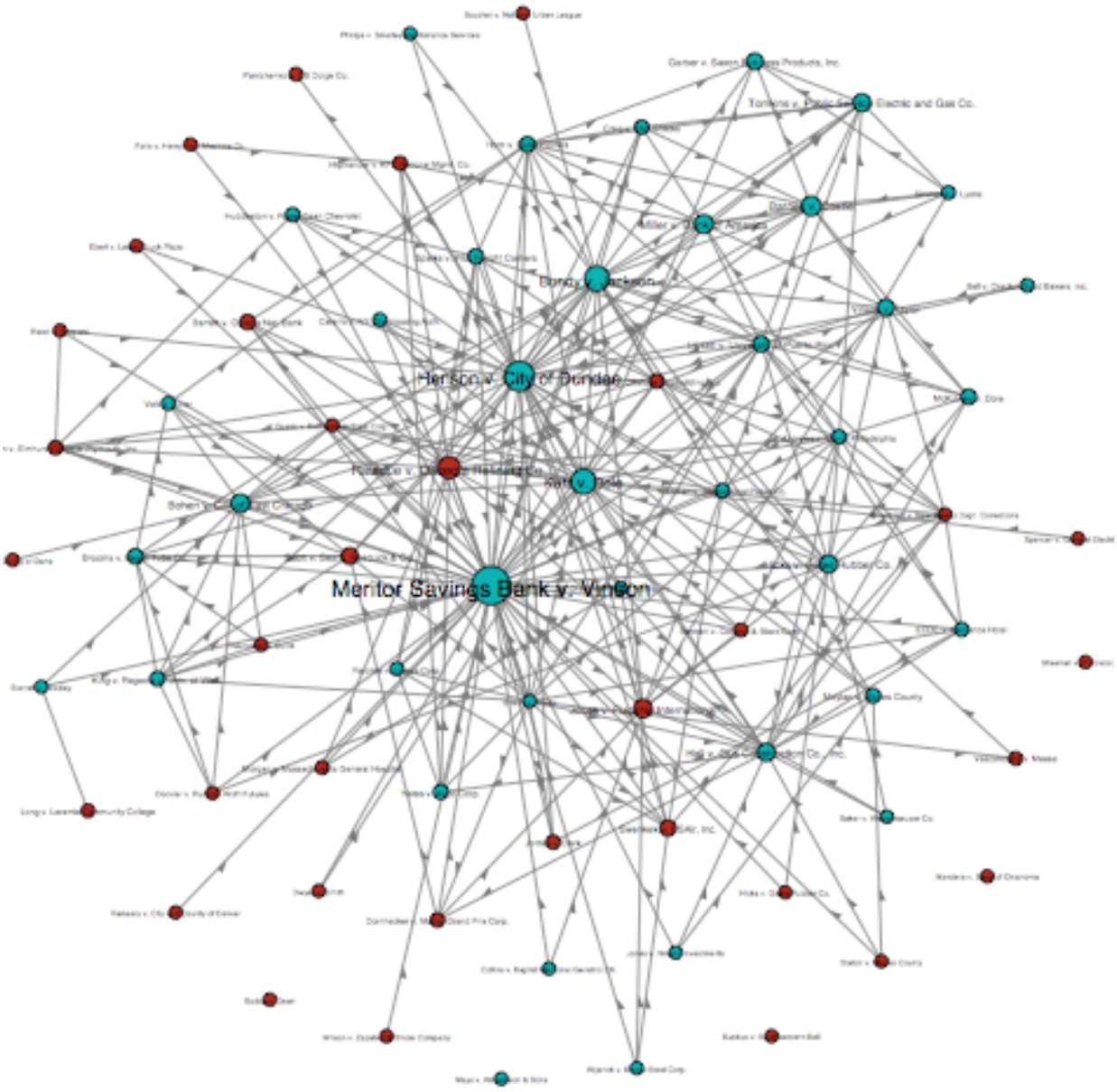


Figure 7 considers whether plaintiff wins or defendant wins are more central to the development of the caselaw. In this visualization, blue represents plaintiff wins, red represents defendant wins, and it appears to be plaintiff wins that are the most central.

Figure 7: **Plaintiff and Defendant Wins in the Network**

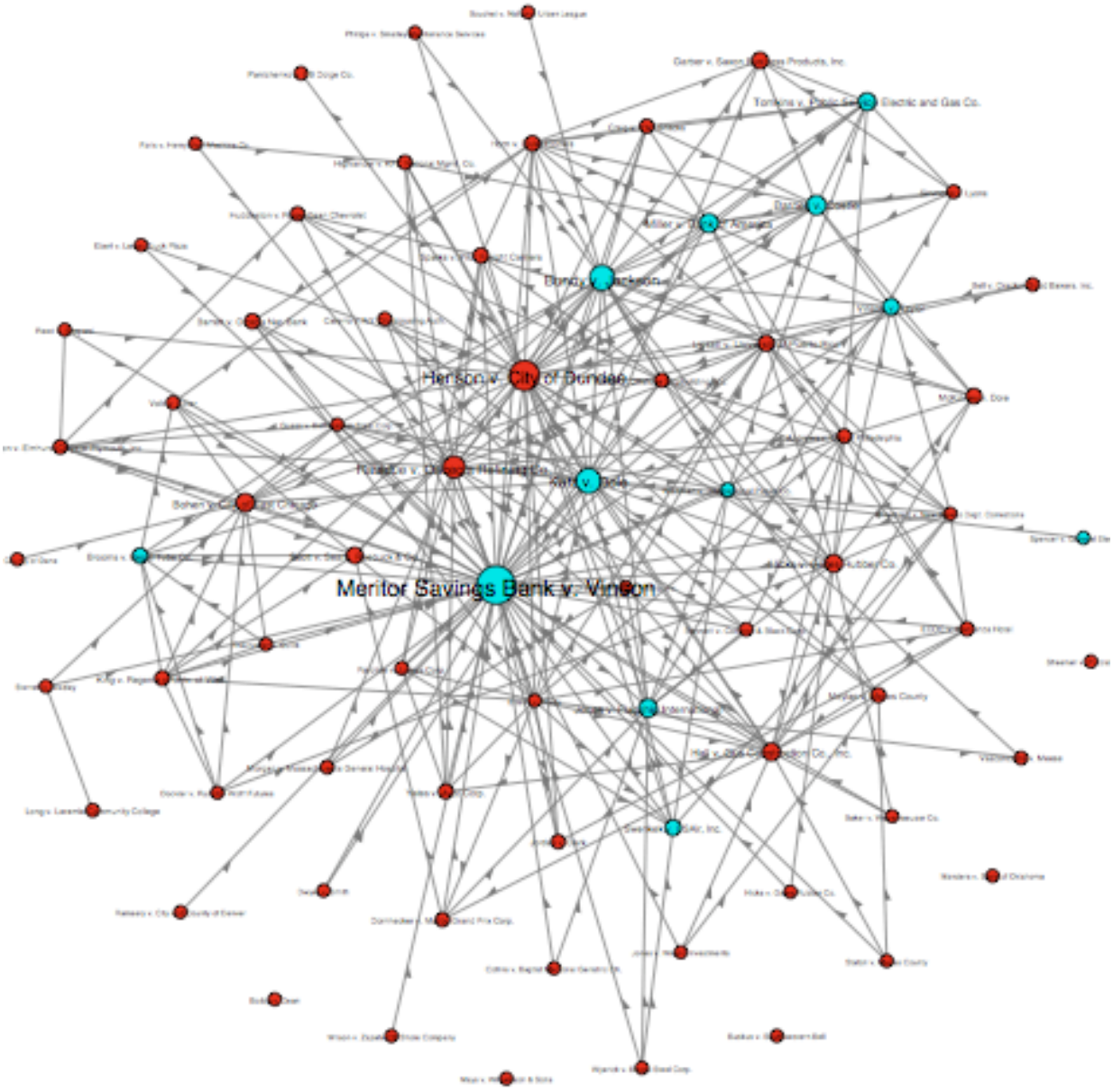
Red nodes represent defendant wins, blue nodes represent plaintiff wins



The final visualization, Figure 8, looks at the role of organizational and governmental plaintiffs – who appear to be very successful at "playing for rules" given their highly central and large roles in this network given their proportion to all cases. (These are represented by the blue nodes).

Figure 8: **Governmental and Organizational Support Cases in the Network**

Blue nodes represent cases involving governmental (EEOC) or organizational support). Red nodes are all other cases



In addition to using visualization to study the network, I took the measures generated by gephi and used them as dependent variables in a regression equation, to see the extent to

which the visual impressions of relative network importance could be documented more precisely. Tables 4 and 5 look at Indegrees, without and with a control for time. Because the effect of time is highly correlated with almost everything I am interested in and with the dependent variable, I am concerned both that it needs to be in the analysis and that it might be swamping any other relevant effects. In both versions, a race bridge and the presence of governmental and organizational support is a highly significant predictor of higher citation rates – reflecting more prominence in the network. However, neither plaintiff win rates nor panel ideology are significant predictors of higher citation rates.

Table 4: **Factors Related to Higher Citation Rates**

without controlling for effect of time

	Coefficient	Std. Error	t	p value
Majority Dem Panel	2.08	1.62	1.28	.21
Race Bridge	**3.62**	**1.77**	**2.05**	**.04****
Plaintiff Win	.75	1.71	.44	.66
Govt /Org Support	**6.29**	**2.10**	**2.99**	**.004*****
Circuit	-.16	.22	-.73	.47

**Significant at .05
***Significant at .01
n=73
adj R-squared = .29

Table 5: **Factors Related to Higher Citation Rates**

controlling for effect of time

	Coefficient	Std. Error	t	p value
Majority Dem Panel	1.38	1.61	.86	.39
Race Bridge	**3.59**	**1.72**	**2.09**	**.04****
Plaintiff Win	.17	1.68	.10	.92
Govt /Org Support	**4.97**	**2.13**	**2.33**	**.02****
Circuit	-.20	.22	-.90	.37
Elapsed Year	**-.48**	**.22**	**-2.21**	**.03****

**Significant at .05
n=73
adj R-squared = .38

Table 6 contains the results of a regression where eigenvector centrality is the dependent variable, showing that plaintiff wins, and cases with government or organizational support are in fact highly central to the citation network.

Table 6: **Factors related to Greater Centrality**

(Eigenvector centrality dependent measure)
without controlling for effect of time

	Coefficient	Std. Error	t	p value
Majority Dem Panel	.04	.05	.74	.47
Race Bridge	-.003	.056	-.07	.95
Plaintiff Win	**.09**	**.05**	**1.70**	**.09***
Govt /Org Support	**.29**	**.07**	**4.32**	**.000*****
Circuit	.008	.007	1.13	.26

*Significant at .10
***Significant at .01
n=73
adj R-squared = .31

Ultimately the visualization results are supported by statistical tests in three out of the four cases considered: where the case involves a race bridge, where the case involves governmental or organizational support, and where the case involves a plaintiff win. However, there is no clear statistical support for panel ideology being a clear driver of network structure, although that is suggested by the visualization.

Most importantly, governmental or organizational support appears consistently important in all versions of the network analysis. Cases where either the EEOC or an organization participated, presumably to "play for rules," became the cases that were later cited or relied on and which are key cases in the network. That suggests the effort to play for rules was successful. In the next section, I consider how important that might have been.

RESULTS – LOGISTIC REGRESSION ANALYSIS

After performing the network analysis and the regression of network measures, I turned to a common model for testing the effect of judicial politics on case outcomes – a logistic regression analysis where either the winner of the case or the party the judge voted for are the dependent measures. These results were consistent with some of the key earlier findings in terms of the importance of the race bridging effect, and to some extent the role of governmental and organizational plaintiffs, but also revealed some interesting findings regarding additional legal and political variables. This model also allowed me to incorporate more case specific factors.

Table 7 analyzes results case by case and uses the case outcome as the dependent measure. These results show, consistent with prior attitudinal studies, that judicial ideology is a significant predictor of outcome – even in this dataset of appellate cases where the courts are potentially more constrained. The assumption is that liberal scoring judges would be more

likely on policy preference grounds to support plaintiffs, and that conservative scoring judges would be more likely, *ceteres paribus*, to support defendants. In this case, because an increase in the GHP scores reflects an increased conservative orientation, the negative sign shows the expected politics to outcome relationship.

Notably, however, certain legal factors are also significant predictors, including whether the case involved the core legal issue of whether the harassment constituted a civil rights violation under Title VII and whether the case was a "race bridging" case citing prior civil rights law. Both of these factors are significantly and positively correlated with pro-plaintiff outcomes.

Table 7: **Factors Related to Increased Likelihood of Plaintiff Win**

	Coefficient	Std. Error	z	p value
Plaintiff won below	**4.04**	**1.48**	**2.73**	**.006*** **
Factfinding Below	-1.77	1.15	-1.54	.124
Panel Ideology	**-7.77**	**3.22**	**-2.42**	**.02****
Govt /Org Support	.03	1.56	.02	.985
Circuit	.14	.18	.77	.44
Elapsed Year	-.22	.24	-.91	.365
EEOC guidelines cited	.82	1.09	.75	.45
Race discrimination cases cited	**3.55**	**1.21**	**2.94**	**.003*** **
Sex discrimination cases cited	-1.64	1.88	-.87	.39
Meritor case cited	2.51	1.63	1.53	.125
Because of sex an issue	**3.54**	**1.42**	**2.49**	**.013****
Any defense an issue (except agency)	.32	1.12	.28	.78

**Significant at .05
*** Significant at .01
n=70
Pseudo R-squared = .64

I then moved to testing these factors on a vote by vote basis – providing more analytic power. Here the dependent measure is whether the judge voted for the plaintiff in a particular case (which is usually, but not always, also an indicator the plaintiff won).

I performed three versions of this analysis, one for all cases 1977 – 1991, one for cases decided before *Meritor* and one for cases decided after *Meritor*, based on some preliminary analysis suggesting the importance of this as a break point. Figure 9 and Table 8 show the changes in plaintiff win rates and Figure 10 shows the changes in the ideological composition of the panels, respectively. After 1986, plaintiffs were winning less frequently and facing more conservative panels. More importantly, before 1986 Republican appointed judges were voting

overwhelming in favor of plaintiffs and consistently with Democratic judges. After 1986 a clear ideological split in voting patterns appears. (Tables 9 and 10).

Figure 9: **Changes in Plaintiff Win Rates Over Time**

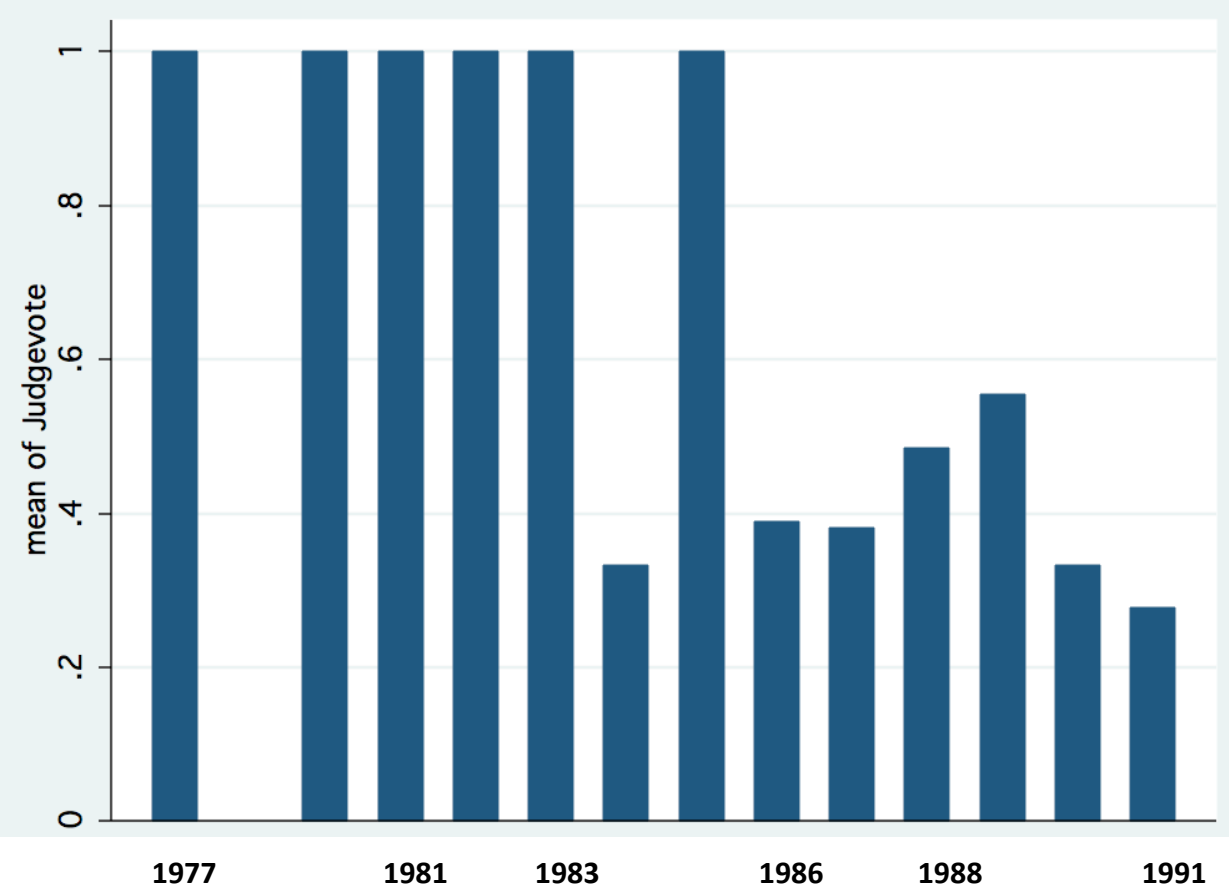


Table 8: **Win Rates Before and After *Meritor* Ruling**

	Pre-Meritor	Post-Meritor	Total
Defendant Win	4	30	34
Plaintiff Win	16	22	38
Total	20	52	72

Figure 10: **Changes in Ideological Composition of Deciding Judges Over Time**

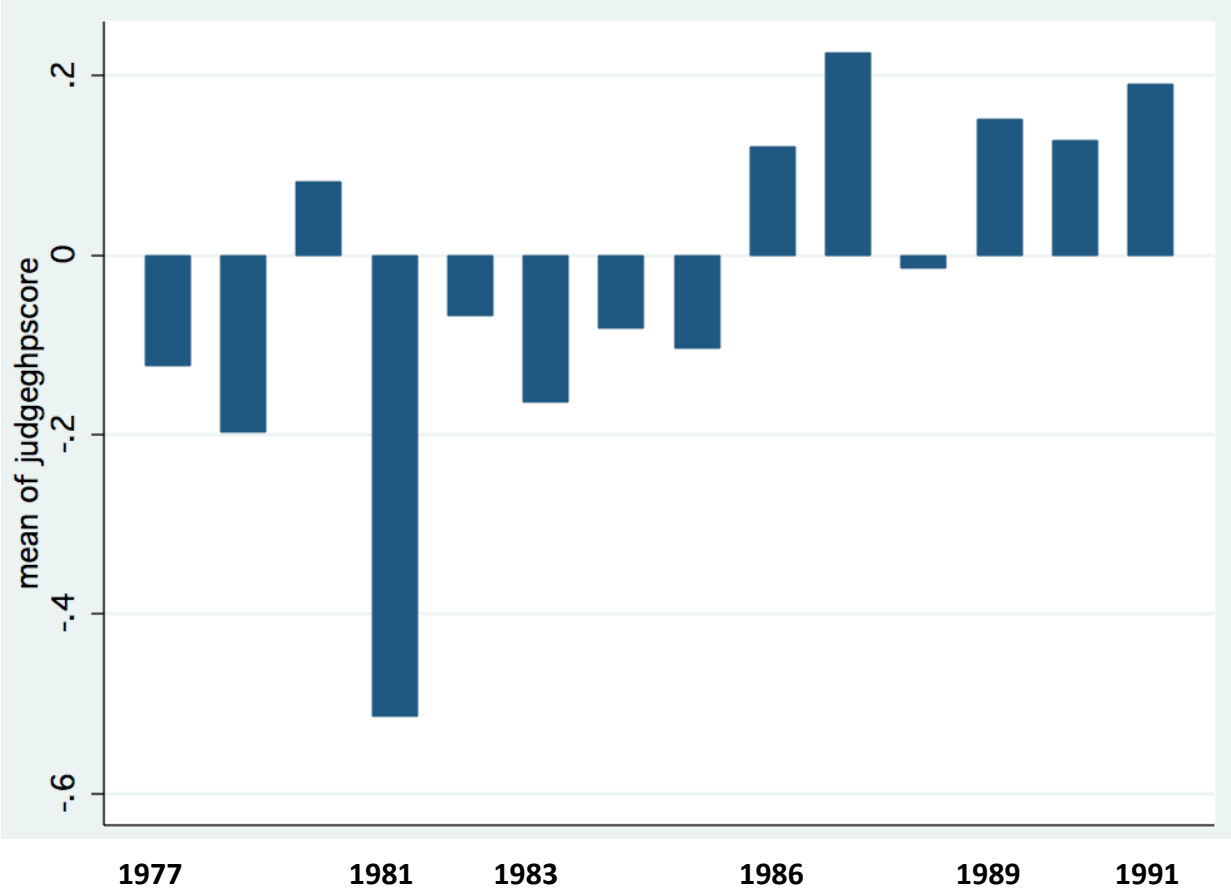


Table 9: **Pre-Meritor Cases and Partisan Voting Patterns**

	Democratic Appointed Judges	Republican Appointed Judges	Total
Vote for Defendant	7	5	12
Vote for Plaintiff	32	15	47
Total	39	20	59

Table 10 Post-Meritor Cases and Partisan Voting Patterns

	Democratic Appointed Judges	Republican Appointed Judges	Total
Vote for Defendant	24	66	90
Vote for Plaintiff	25	41	66
Total	49	107	156

These differences appear in the regression when the full universe (Table 11) is compared with the cases decided before and after *Meritor* (Tables 12 and 13). Note that when the pool of cases is split, many of the predictive variables drop out of the sample – making it hard to draw firm conclusions especially given the low overall explanatory power of this version of the analysis. But an ideological effect appears strongly in the full set of cases and the post-1986 cases, but not in the pre-*Meritor* cases.[295]

In addition to ideology, some legal factors and some organizational resource factors remain important predictors at the judge vote level. In the full universe of cases and the post-*Meritor* cases, the presence of a race bridge and whether the decision involved the threshold legal issue of whether sexual harassment is discrimination "because of sex" are significant predictors of votes for plaintiff (as are plaintiff wins below). In the pre-*Meritor* cases, the presence of governmental or organizational support, and reliance on the EEOC Guidelines, are significant predictors of plaintiff success. Because of sample size issues, it is hard to draw firm conclusions about the difference between pre- and post-1986 cases on these factors, but there is certainly some evidence that legal factors and organizational resources mattered.

[295] This lack of significance may be an artifact of the relatively lower power of this analysis, but given this result also tracks the other descriptive statistics it is more reasonable to infer an absence of ideological predictors for the pre-1986 cases.

Table 11: **Factors Related to Increased Likelihood of Voting for Plaintiff**

All cases 1977 - 1991

	Coefficient	Std. Error	z	p value
Plaintiff won below	**2.41**	**.55**	**4.41**	**.000*** **
Factfinding Below	-.63	.49	-1.28	.20
Judge GHP Score	**-2.29**	**.69**	**-3.34**	**.001*** **
Govt /Org Support	-.27	.71	-.37	.71
Elapsed Year	**-27**	**.11**	**-2.38**	**.02** **
Circuit	-.04	.09	-.49	.62
EEOC guidelines cited	.52	.47	1.12	.26
Race discrimination cases cited	**2.91**	**.67**	**4.38**	**.000*** **
Sex discrimination cases cited	-1.34	.83	-1.61	.11
Meritor case cited	**1.64**	**.79**	**2.09**	**.04** **
Because of sex an issue	**2.92**	**.67**	**4.38**	**.000*** **
Any defense an issue	-.36	.48	-.76	.45

**Significant at .05

*** Significant at .01

n=214

Pseudo R-squared = .52

Table 12: **Factors Related to Increased Likelihood of Voting for Plaintiff**

Cases Pre-Meritor Ruling (1977-1986)

	Coefficient	Std. Error	z	p value
Judge GHP Score	-.02	1.09	-.02	.99
Govt /Org Support	**1.54**	**.83**	**1.85**	**.06***
Circuit	.13	.11	1.21	.23
EEOC guidelines cited	**1.49**	**.82**	**1.82**	**.07***

*Significant at .10
n=47
Pseudo R-squared = .17

Table 13: **Factors Related to Increased Likelihood of Voting for Plaintiff**

Cases Post-Meritor Ruling (1986-1991)

	Coefficient	Std. Error	z	p value
Plaintiff won below	**2.09**	**.54**	**3.89**	**.000*** **
Factfinding Below	-.11	.51	-.21	.83
Judge GHP Score	**--2.5**	**.74**	**-3.37**	**.001*** **
Govt /Org Support	-.39	.89	-.44	.66
Circuit	-.12	.09	-1.26	.21
Elapsed Year	-.13	.18	-.71	.48
EEOC guidelines cited	.31	.50	.63	.53
Race discrimination cases cited	**2.53**	**.58**	**4.40**	**.000*** **
Sex discrimination cases cited	-1.24	.98	-1.27	.20
Because of sex an issue	**2.15**	**.77**	**2.80**	**.005*** **
Any defense an issue	-.70	.50	-1.42	.16

**Significant at .05
*** Significant at .01
n=155
Pseudo R-squared = .39

In a further effort to understand the role of legal factors, I performed an analysis of how the legal issues raised in a case correlate to judges voting in favor of plaintiffs. As expected, in cases addressing the core legal issue ("because of sex") plaintiffs fare far better than in cases addressing limitations of the claim (unwelcomeness) or defenses (damages).

Table 14: **Legal Issues Related to Voting for Plaintiff**

All cases 1977-1991

	Coefficient	Std. Error	z	p value
Because of Sex	**3.38**	**.73**	**4.64**	**.000*** **
Unwelcomeness	-1.53	.95	-1.61	.10*
Severe or Pervasive	-.08	.06	-1.18	.24
Tangible Employment Action	1.78	.80	2.21	.03
Agency	**1.68**	**.53**	**3.16**	**.002*** **
Factual or Procedural Defense	-.74	.66	-1.12	.26
Damages	**-1.69**	**.92**	**-1.85**	**.07***
Plaintiff Won Below	**1.85**	**.52**	**3.58**	**.000*** **
Elapsed Year	-.01	.08	-.01	.993
Circuit	-.0006	.08	-.01	.99
Judge GHP Score	**-2.03**	**.65**	**-3.12**	**.002*** **

*Significant at .10 level
***Significant at .01 level
n = 214
Pseudo R-squared = .44

SUMMARY OF RESULTS

The results of the quantitative analysis yield a set of key conclusions, which largely track the more descriptive portrayal of the prior chapters:

First, the underlying debate over the legal rule was settled definitively in favor of plaintiffs. Cases involving that issue are at the center of the network, and cases involving the issue "because of sex" are cases where plaintiffs have higher success than on other issues. Even after 1986 this issue was settled in favor of plaintiffs, and in the pre-1986 cases, most of which deal with the establishment of the right, both Republican and Democratic judges voted in favor of plaintiffs.

Second, the organized litigants who played for rules largely succeeded – the cases involving government or organizational amici defined the central precedential rulings in the network. The reliance on resources from the fight against racial segregation also appears to be important in the establishment of precedents involving sexual harassment. The EEOC guidelines similarly had a constraining effect at least on the early rule definition cases.

Third, partisan politics remains a significant factor in plaintiff success rates in these appellate decisions. This validates a key finding of the behavioralist literature and continues its extension to courts below the Supreme Court. This is particularly so after 1986, when cases shifted from defining the scope of the rule to defenses and issues of application. As time goes on, plaintiffs are less likely to prevail, suggesting that the changes in the larger political environment are having an effect.

Finally, 1986 is a turning point in many respects, suggesting both a lagged effect of changes in the makeup of the judiciary and the difference between litigating over the basic civil rights rules and deciding how to apply them.

In the final chapter, I place these results with the analysis from the prior conclusions to explore what this case says about the larger debates in the literature.

CHAPTER 5: CONCLUSION – FITTING THIS CASE INTO A LAW AND SOCIETY FRAMEWORK

Abstract: In summarizing the prior analysis, this chapter also places the key findings of this case about individual mobilization, organizational strength, the effect of legal rules and the role of partisan politics into a larger theoretical framework. This case validates key conclusions of prior research and also suggests ways to expand prior theory that can be further tested in future research.

What conclusions can be drawn from this case for larger theoretical questions and future empirical tests? These results raise three issues of potential importance: (1) the role of individual litigation in setting agendas both for courts and for social movement organizations; (2) the expansion of theories about legal resources and litigation success to incorporate the resources and tactical choices of opponents and (3) the interaction between legal norms and structures and underlying political trends to create a shifting terrain of constraint and amplification. I consider these questions in the context of applying a more sociolegal framework to existing public law debates.

The law and society movement has raised legitimate empirical and theoretical challenges to the idea of remaking society through law. The core question this study addresses – under what circumstances can organizations successfully use law to resist political opposition -- requires acceptance both that law matters to counteract politics and that activists can use law to carry out their own political agendas without co-optation. A long scholarly tradition questions both of those assumptions.

And yet, this case appears to be an example of conventional success. Individual civil rights litigation constructed a larger legal movement , which in turn became successful enough to make it politically costly for conservative opponents to fully resist. The very conservative chair of the EEOC who would become a very conservative member of the Supreme Court and who was a clear skeptic of traditional civil rights arguments had the opportunity to erase his predecessor's regulations and chose not to. The Supreme Court declined the invitations of the Chamber of Commerce and the Solicitor General to rule the *Vinson* claim out of bounds. And plaintiffs won case after case until 1986, before liberal and conservative judges.

One of the new questions that emerges from this case is the relationship between individual litigation, and movement or impact approaches to the use of law. In the early stages of a law-centered cause, lawyers may become allied to that cause simply by taking a particular client with a grievance. Individuals who file claims may be acting in advance of a larger movement or organization. Yet in the process of simply engaging in everyday lawyering the claimants and their counsel can become critical advocates for a larger political and moral agenda. This story of bottom-up, organic and sometimes serendipitous legal activism stands in contrast to the view of cause lawyers as pre-defined by a common political consciousness. Existing models of cause lawyering that require coherence of identity, affiliation, strategy or professional context fail to adequately explain these lawyers and their work. To accommodate their experience requires a more constituitive approach to understanding how lawyers mobilize for social change -- and how individual claimants can be catalysts in that process.

Because public law scholarship has not always focused on the role of individual litigants as change agents or political actors, borrowing that sociolegal framework is especially appropriate. Here individual claims largely drove the key early rulings of a major legal innovation. Ultimately, social movement organizations and activists helped propel the problem of sexual harassment on the national agenda, but the underlying necessary legal change was already underway. This interaction between individuals and organizations produced a rapid convergence of appellate decisions and regulatory reform addressing all the key principles of sexual harassment law by 1980. That fortuitious timing, in turn, played a role in protecting the new right from Reagan-era backlash.

This case reveals how the relative openness of the U.S. legal system creates opportunities to construct a cause through lawyering. Central to much of the cause lawyering literature is the notion that private litigation has political power:

> The history of the claim for sexual harassment, therefore, is a powerful example of private litigation with political consequences. Women's "personal" problems fending off the sexual demands of their supervisors and co-workers were translated into legal claims based on Title VII, a statute protecting individuals while advancing the public goal of ending sex discrimination in employment."[296]

A single plaintiff with no more resources than her own claim and her lawyer can force the state to confront a serious political issue. Winning is of course not guaranteed. But the mere fact that courts have to decide in favor of one side or the other creates opportunities for innovation that can be harder to come by through the legislative process or direct action. In this context, a handful of individual rulings have an impact that is magnified, as they are used to build a legal precedent that in turn serves as a resource for future cases. These early cause lawyers benefitted not just from the system's openness to innovation, but from the concrete structural benefit provided by Title VII's grant of attorney fees.[297] That made it more likely that private attorneys would take on civil rights cases – indeed this is the "private attorney general theory" animating the provision.

It turns out that even the most formalized and top-down litigation campaigns in practice look more constructed than choreographed– especially at the beginning. In telling the story of Ruth Bader Ginsberg and the ACLU Women's Rights Project, Fred Strebeigh shows us how much of a struggle it was to find good cases, and, in particular, to control the litigation in ways that advanced the strategic goal.[298] It may be that the experience of lawyering without, or before, a cause emerges, is a common stage of cause development.

In the years it may take before a new cause is clearly defined in public consciousness, it is harder to draw the line between simple client representation and political or moral activism.

---

[296] Marshall, *supra* note 12 at 762.

[297] Catherine R. Albiston and Laura Beth Neilsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA LAW REVIEW 1 (2007).

[298] Strebeigh, *supra* note 114.

Establishing sexual harassment as illegal sex discrimination involved a process of naming, blaming and claiming writ large, as a series of lawyers and their clients worked one at a time to define and challenge a widely accepted male privilege in the workplace. As Shamir and Chinski explain in critiquing a concept of cause lawyering grounded in stable identity and specific commitments:

> It is in the course of engaging in various professional practices that the possibility of becoming or functioning as a lawyer for a cause is realized.[299]

The relatively open structure of American civil rights litigation, where anyone who can gather the resources can file a claim, where the law can help you fund your case if successful, and where you do not need more than a single plaintiff and single attorney to begin, provides a democratized mode of organizing quite different than legislative or contentious politics.[300] Yet it can be every bit the morally-centered form of activism that the term "cause lawyering" intends to reach.

This example of how individuals can set the agenda through litigation in the absence of organizations, existing legal theory, or a widely shared cause, is likely not an isolated case. And its larger implication is that individuals can force movement organizations to engage law, regardless of the larger political and strategic implications of working within the legal system. The fight for marriage equality in the United States is perhaps the clearest example of the tension between individual litigation and social movement organizations, but there are certainly others. In the end, this case shows how the empirical and theoretical question of whether social movement organizations should litigate must be tempered by the reality that this is an arena movements do not fully control. It may be worth applying this lens to other examples where individuals may "disrupt" the carefully chosen organizational strategies.

In addition to showing how law can serve as a resource to movements and organizations, this case shows how organization is itself a resource for success. Following both a longstanding literature on all forms of collective action, and the Epp's finding about legal resources in particular, it is hardly suprising that working hard to file amicus briefs and comment on regulations and engage with Congress pays off. It is a satisfying even if conventional result to see that cases where organizations or the government supported the plaintiff became the key precedents that they hoped for.

The counterfactual scenario remains unknown. What might have happened if the opposition had been just a little quicker off the mark? Here the organizational vacuum on the other side is striking. Is it enough to be strong and effective advocates or does the quality of the opposition matter? Identifying a good comparative case might help answer that question – perhaps affirmative action, litigated over a similar time period but with a much more public, equally engaged and organized set of opponents – the early conservative public interest legal organizations -- at its core.

---

[299] Shamir and Chinski, *supra* note 95 at 230-31.

[300] Zemans, *supra* note 31.

Before turning from the litigants to the law, it is worth identifying a few questions these data do not satisfactorily answer. One is why there was so little organized opposition – was it because no one knew this would become a big deal? Until the Hill/Thomas hearings took place, sexual harassment was not a major part of the nation's public conversation. Was it because so many other issues on the regulatory front took the business community's attention? Was it just that the conservative legal infrastructure lagged behind their liberal counterparts, and that the effect of conservative politics was delayed? Did the attack on sexual harassment regulations peak too soon?

A final unexplored question is whether sexual harassment itself is an issue that resists retrenchment. Other hot-button issues of the time (affirmative action, crime, welfare) were linked to race. A protectionist or paternalistic conservative could find sexual harassment so inappropriate to the workplace it might override concers about limiting employers or the market. I had hoped that gathering data on framing might reveal those kinds of fault lines, but they simply did not show up. And what did show up was, interestingly enough, that the race discrimination framework was a net positive, at least within the legal regime.

And so to law. Contrary to expectations, Republican judges voted for sexual harassment plaintiffs consistently at least until 1986. Republican Justices of the Supreme Court deferred to the EEOC regulations written by President Carter's nominee. Cases used analogies to earlier principles of the civil rights movement to settle the legal status of sexual harassment rapidly and with only a short period of real controversy. Courts ruled, deferred to earlier courts, and established an obviously path dependent regime.

But if you parse the data, after 1986 the story seems to shift again. Without disturbing the basic rule that plaintiffs can legitimately treat sexual advances and harassing conduct as sex discrimination, new issues, such as factual disputes, the scope of defenses and limits on the claim, came to the fore. As time passed and Reagan's nominees became a larger proportion of the bench, the results for plaintiffs reflected new barriers to successful claims. And of course, the settling of the law itself likely created strong incentives to settle that in turn altered the agenda before the federal courts. Is this politics, or law, or both?

The real debate over the relevance of precedent to politics may not be between social science and legal models of judging, but may lie with whether positivist or interpretivist approaches best illuminate the processes at work. Michael McCann explains that "judicial decisions express a whole range of norms, logics and signals that cannot be reduced to clear commands or rules."[301] He stresses the ways in which court decisions establish the boundaries of action or debate and that this signaling mechanism penetrates at varying levels – "the effects of judicial opinions. . . are inherently indeterminate, variable, dynamic and interactive."[302] While aspects of the legal model, especially in its contemporary critical posture, hint at this idea, existing social science inquiries maintain a strict positivist barrier against such

[301] Michael McCann, *Reform Litigation on Trial,* 17 LAW AND SOCIAL INQUIRY 715, 732 (1992).

[302] *Id.* at 733.

complexities. If "particularity, multiplicity and ambiguity" are "central virtues of postrealist law and society research," then that research can amplify the existing positivist account of judging in new ways, and test the legal model of judging with models that may better reflect its empirical reality.[303]

This case calls into question how we measure and operationalize legal factors on the one hand and political factors on the other. As the institutionalist framework suggests, legal critiques of the attitudinal model do not go far enough. The problem is not that the political science literature has an insufficiently complex model of doctrine, or judging, but that it presumes one can reliably identify ideology on the one hand, and law on the other. In this regard it has a thin view both of law and politics. The legal model is little better in its view of law as independent and exogenous from larger social and political forces. It is likely to be true that judicial ideology plays a role in individual outcomes. It is also likely to be true that doctrine constrains courts. But it is also quite possible that the relationship between law and politics owes something to the social construction of law.

Legitimacy, a foundational political problem, is also what gives legal norms their power. Richard Fallon, in surveying the Rehnquist Court's federalism jurisprudence, argues for a broader conception of the path dependence of legal doctrine, [304] one that permits considering how political factors, like the popularity of sexual harassment, become reflected in what we otherwise measure as law:

> [T]he notion of path dependence also links the legal force of precedent with an implication that the Court feels constrained by surrounding attitudes in the public and political culture. Absent unusually strong foundations in constitutional text and the evolving public sense of fairness or necessity, the Court may believe it would risk public confidence if, especially by a narrow margin, it were simultaneously to reverse its own precedent and to dramatically alter settled schemes of rights and responsibilities.[305]

This echoes in certain respects the Epstein and Knight theory of a "norm of stare decisis."[306]

Because all of these interactions between law and culture come with a certain degree of indeterminacy, there are opportunities for ideologically-driven judging. Politics may drive both the development and selective deployment of particular doctrinal choices. Because existing doctrine has already framed questions in particular ways, judges cannot perfectly enact their political or policy preferences in law. Legitimacy requires new legal rules to connect both with

---

[303] Austin Sarat, *Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship, in* Austin Sarat, ed., THE BLACKWELL COMPANION TO LAW & SOCIETY 1, 8 (2004).

[304] Richard Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions,* 69 UNIVERSITY OF CHICAGO LAW REVIEW 429 (2002).

[305] Fallon, *supra*, at 434-35.

[306] Epstein and Knight, *supra* note 8.

societal conceptions of law and the historical path laid down by prior rules – as a mandate to eradicating segregation became a justification for a more woman-friendly workplace.

As Caroll Seron and Susan Silbey write, "By focusing so closely on the gap between the law on the books and the law in action, it turns out that law and society scholars opened the way for a cultural analysis of law."[307] That analysis, in particular asks "how that gap provides the space for the social construction of law and legality."[308] Studying how law interacts with cultural, political and social processes to produce meaning has substantial implications for an analysis of formal legal doctrine. Every version of the legal model recognizes the operation of precedent is a mix of constraint and contingency. The realist critique and what empirical evidence exists presses the claim that ideological factors are at work, without completely dismissing aspects of the legal model. This complex interaction suggests that gaps indeed exist, which could allow culture and social structure to enter the process. Properly conceptualized, the indeterminacy critique does not simply identify the mechanism whereby ideology influences doctrine, but reveals the constituitive nature of law. Neither legal doctrine nor political ideology are the static constructs coded by traditional positivist research, but rather much more fluid mechanisms better understood in light of institutional constraints and cultural norms.

If *stare decisis* operates **at all**, then court rulings control future outcomes – the only question is how much. To say that judicial ideology (or background or even institutional context) predicts the outcome of a particular case presents the narrowest possible reading of outcome. When a court is confronted by two parties in formal litigation, it is not choosing from an unlimited universe of possible outcomes. *Stare decisis* has **already shaped the outcome** in critical ways, long before the dispute even reaches the court. There are suggestions in these data that such a process is at work here, but that question remains to be tested.

At their extremes, the legal and social science models yield completely implausible conclusions regarding the operation of *stare decisis*. For one, law is perfectly path dependent. For the other, the relationship between doctrine and outcome is essentially random. Indeed, scholars in both camps likely concede that a mix of law and politics is at work in the American judicial system, with disputes arising largely around at which end of the continuum one strikes that balance. The increasing interest, particularly in the legal academy, in hybrid legal-social science models creates potential for a much more effective inquiry into the balance of doctrinal and political forces in judicial outcomes.[309]

The social significance of sexual harassment as a civil rights violation would only increase as time went on. On November 21, 1991, Congress moved to further expand sexual harassment law by passing the Civil Rights Act and opening the federal courts to damages

---

[307] Caroll Seron and Susan S. Silbey, *Profession, Science and Culture: An Emergent Canon of Law and Society Research*, *in* BLACKWELL COMPANION TO LAW & SOCIETY 30, 32 (1984).

[308] *Id.*

[309] Epstein & Knight, *supra* note 8 at 173.

claims. Only a month earlier the nation had been rivited by the Hill-Thomas hearings as sexual harassment broke through to the mainstream. Two years later sexual harassment complaints to the EEOC would have more than doubled over 1991 levels – from 3223 to 7088. Workplace sexual harassment training is now commonplace, and the legal regime generates a lucrative defense and compliance business. American culture, as Saguy finds, has absorbed these lessons so well that even legal conduct is questioned.[310]

All that began with a handful of women who intuited that they had a right to work free of sexual harassment. There were many points at which this idea could have failed – if lawyers did not take up their cause, if feminist organizations had not put resources into supporting it, if Reagan had taken office perhaps four years earlier, if the employer community had mobilized more quickly to derail if, if over a decade of Title VII enforcement had not established fertile ground in federal doctrine. And so, they succeeded – up to a point – despite a growing hostile environment.

[310] Saguy, *supra* note 25.

BIBLIOGRAPHY

Bruce Ackerman, WE THE PEOPLE: FOUNDATIONS (1991).

Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOCIETY REVIEW 11 (2005).

Catherine R. Albiston and Laura Beth Neilsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA LAW REVIEW 1 (2007).

Norman Amaker, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION (1988).

Orly Ashenfelter, Theodore Eisenberg and Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 THE JOURNAL OF LEGAL STUDIES 257 (1995).

Carrie N. Baker, THE WOMEN'S MOVEMENT AGAINST SEXUAL HARASSMENT (2008).

Stephen Barkan, *Legal Control of the Southern Civil Rights Movement,* 49 AMERICAN SOCIOLOGICAL REVIEW 552 (1984).

Rosalyn Baxandall, *Catching the Fire, in* THE FEMINIST MEMOIR PROJECT: VOICES FROM WOMEN'S LIBERATION 208, 212 (1998).

Lawrence Baum, JUDGES AND THEIR AUDIENCE (2006).

Lawrence Baum, *Specialization and Authority Acceptance: The Supreme Court and Lower Federal Courts*, 47 POLITICAL RESEARCH QUARTERLY 693 (1994).

Frank R. Baumgartner & Bryan D. Jones, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (1993).

Derrick Bell, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,* 85 YALE LAW JOURNAL 470 (1976).

Susan Bisom-Rapp, *Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice,* 26 FLORIDA STATE UNIV. LAW REVIEW 959 (1999).

Henry Campbell Black, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS (1912).

Ryan C. Black, James F. Spriggs, *The Depreciation of Precedent on the U.S. Supreme Court*, (2011), Draft Paper available at http://polisci.wustl.edu/files/polisci/black_spriggs_depreciation.pdf (last visited July 3, 2011).

Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering, in* Austin Sarat and Stuart Scheingold, CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (2001).

Michael J. Bommarito, Daniel Martin Katz, Jon Zeiner, James H. Fowler, *Distance Measures for Dynamic Citation Networks,* 390 PHYSICA A (2010).

Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421 (1987).

Bureau of Labor Statistics, WOMEN IN THE WORKFORCE: A DATABOOK (2010).

Benjamin Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921).

Edward G. Carmines and James A. Stimson, ISSUE EVOLUTION (1989).

Peter J. Carrington, John Scott, Stanley Wasserman, MODELS AND METHODS IN SOCIAL NETWORK ANALYSIS (2005).

Augustus B. Cochran III, SEXUAL HARASSMENT AND THE LAW: THE MECHELLE VINSON CASE (2004).

Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 34 COLUMBIA LAW REVIEW 809 (1935).

Nadine Cohudas, *Reagan's Legacy is Not Only on the Bench*, 46 CONGRESSIONAL QUARTERLY WEEKLY REPORTS 3392 (Nov. 26, 1988).

Frank B. Cross, *Decisionmaking in U.S. Courts of Appeal*, 91 CALIFORNIA LAW REVIEW 1457 (2003).

Cross, et al, *Citations in the U.S. Supreme Court: An Empirical Analysis of Their Use and Significance,* 2010 UNIV. OF ILLINOIS LAW REVIEW 489 (2010).

Scott Cummings and Douglas NeJaime, 57 U.C.L.A. Law Rev. 1235, *Lawyering for Marriage Equality* (2010).

Robert Dahl, *Decision Making in a Democracy: The Supreme Court as a National Policymaker*, 6 JOURNAL OF PUBLIC LAW 267 (1957).

Gerald F. Davis, et al, eds., SOCIAL MOVEMENTS AND ORGANIZATION THEORY (2005).

Mario Diani and Doug McAdam, eds., SOCIAL MOVEMENTS AND NETWORKS: RELATIONAL APPROACHES TO COLLECTIVE ACTION (2003).

Ronald Dworkin, LAW'S EMPIRE (1986).

Lauren B. Edelman, Gwendolyn Leachman, Doug McAdam, *On Law, Organizations and Social Movements,* 6 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 653 (2010).

Lauren B. Edelman, Christopher Uggen, Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AMERICAN JOURNAL OF SOCIOLOGY 406 (1999).

Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AMERICAN JOURNAL OF SOCIOLOGY 1531 (1992).

Charles R. Epp, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVES (1998).

Lee Epstein and Jack Knight, *Courts and Judges, in*, Austin Sarat, ed., THE BLACKWELL COMPANION TO LAW AND SOCIETY 170 (2004).

Lee Epstein and Jack Knight, *The Norm of Stare Decisis,* 40 AMERICAN JOURNAL OF POLITICAL SCIENCE 1018 (1996).

Lee Epstein, Jack Knight, Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOCIETY REVIEW 117 (2001).

Lee Epstein and Joseph F. Kobylka, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY (1992).

Richard Fallon, *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions,* 69 UNIVERSITY OF CHICAGO LAW REVIEW 429 (2002).

Susan Faludi, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991).

Sean Farhang, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES (2010).

Malcolm Feeley, *The Black Basis of Constitutional Development, in* Harry N. Scheiber, ed., EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 49 (2007).

Malcolm Feeley, *Hollow Hopes, Flypaper and Other Metaphors,* 17 LAW AND SOCIAL INQUIRY 745 (1992).

Malcolm Feeley and Ed Rubin, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

William L.F. Felsteiner, Richard L. Abel and Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . ,* 15 LAW AND SOCIETY REVIEW 631 (1980).

Myra Marx Feree, Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany, 109 AMERICAN JOURNAL OF SOCIOLOGY 304 (2003).

James H. Fowler, et al, *Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents,* 15 POITICAL ANALYSIS 324 (2007).

Alan Freeman, *Antidiscrimination Law from 1954 to 1989: Uncertainty, Contradictions, Rationalization, Denial*, *in* David Kairys, ed. THE POLITICS OF LAW 285 (1998).

Lawrence Friedman, *Legal Rules and the Process of Social Change,* 19 STANFORD L. REV. 786 (1967).

Benjamin P. Friedman, *Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 EMORY LAW JOURNAL 647 (1993).

Paul Frymer, BLACK AND BLUE: AFRICAN-AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY (2007).

Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV 429 (1934).

Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 95 LAW & SOCIETY REVIEW 95 (1974).

Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 UNIV. OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 903 (2005).

Micheal W. Giles, Virginia A. Hettinger, and Todd C. Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POLITICAL RESEARCH QUARTERLY 623 (2001).

Howard Gillman, *What's Law Got To Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decisionmaking*, 26 LAW & SOCIAL INQUIRY 465 (2001).

Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003).

John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 THE WESTERN POLITICAL QUARTERLY 502 (1980).

Lowell L. Hargens, *Using the Literature: Reference Networks, Reference Contexts, and the Social Structure of Scholarship*, 65 AMERICAN SOCIOLOGICAL REVIEW 846 (2000).

John P. Heinz, Ann Southworth, and Anthony Paik, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOCIETY REVIEW 50 (2003).

Ran Hirschl, TOWARDS JURISTOCRACY (2004).

Thomas Hilbink, *You Know the Type: Categories of Cause Lawyering,* 29 LAW AND SOCIAL INQUIRY 657 (2004).

Daniel Katz, et al, *Reproduction of Hierarchy? A Social Network Analysis of the American Law School Professoriate*, 60 JOURNAL OF LEGAL EDUCATION ___ (2001) (forthcoming).

John W. Kingdon, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES (1984).

Michael J. Klarman FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

Linda Hamilton Kreiger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, *in* Faye J. Crosby, Margaret S. Stockdale, S. Ann Ropp, eds SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES 295(2007).

Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 NORTH CAROLINA LAW REVIEW 643 (2000).

Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUMBIA LAW REVIEW 1138 (1999).

Stephanie A. Lindquist and Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. LAW REVIEW 1156 (2005).

Karl N. Llewellyn*, Some Realism About Realism -- Responding to Dean Pound*, 44 HARVARD LAW REVIEW 697 (1931).

David Lyons, *Formal Justice and Judicial Precedent*, 38 VANDERBILT LAW REVIEW 495 (1985).

Catherine A. MacKinnon, THE SEXUAL HARASSMENT OF WORKING WOMEN (1979).

Eric Maltz, *The Nature of Precedent*, 66 NORTH CAROLINA LAW REVIEW 367 (1988). See id. at 373-75.

Forrest Maltzman, James F. Spriggs, Paul J. Wahlbeck, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000).

Anna-Maria Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 LAW & SOCIAL INQUIRY 761 (1998).

Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies,* 39 LAW & SOCIETY REVIEW 123 (2005).

Andrew D. Martin, Kevin M. Quinn, et al., *Competing Approaches to Predicting Supreme Court Decisionmaking*, 2 PERSPECTIVES ON POLITICS 761 (2004).

Doug McAdam, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930–1970 (1982).

Michael McCann, *Law and Social Movements, in* Austin Sarat, ed., THE BLACKWELL COMPANION TO LAW AND SOCIETY 506 (2004).

Michael McCann, *Casual v. Constituitive Explanations, (or, On the Difficulty of Being So Positive)*, 21 LAW AND SOCIAL INQUIRY 457 (1996).

Michael McCann, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

Michael McCann, *Reform Litigation on Trial,* 17 LAW AND SOCIAL INQUIRY 715, 732 (1992).

Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States, in* Austin Sarat and Stuart Scheingold, eds., CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (1998).

David S. Meyer, *Protest and Political Opportunities,* 30 ANNUAL REVIEW OF SOCIOLOGY 125 (2004).

Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUMBIA LAW REVIEW 723 (1988).

Laura Beth Neilsen, and Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WISCONSIN LAW REVIEW 663 (2005).

Anthony Niblett, *Do Judges Cherry Pick Precedents to Justify Extra-Legal Decisions? A Statistical Analysis*, 70 MARYLAND LAW REVIEW 101 (2010).

Nicholas Pedriana*, From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960's,* 111 AMERICAN JOURNAL OF SOCIOLOGY 1718 (2006).

Nicholas Pedriana, *Help Wanted NOW: Legal Resources, the Women's Movement and the Battle Over Sex-Segregated Job Advertisements,* 51 SOCIAL PROBLEMS 182, 187 (2004).

Jennifer Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE LAW JOURNAL 1759 (2005).

Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE LAW JOURNAL 2031 (1996).

Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-66*, 34 LAW AND SOCIETY REVIEW 367 (2000).

Roscoe Pound, *What of Stare Decisis*, 10 FORDHAM LAW REVIEW 1 (1941).

Dana E. Purvis, *Evaluating Legal Activism: A Response to Rosenberg,* 17 BUFFALO J. OF LAW AND GENDER POLICY 1 (2009).

Raka Ray, FIELDS OF PROTEST: WOMENS' MOVEMENTS IN INDIA (1999).

Mark J. Richards and Herbert M. Kritzer, *Taking and Testing Jurisprudential Regimes Seriously: A Response to Lax and Rader*, 72 JOURNAL OF POLITICS 285 (2010).

Mark J. Richards and Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decisionmaking,* 96 AMERICAN POLITICAL SCIENCE REVIEW 305 (2002).

Gerald Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

Edward Rubin, *the Real Formalists, The Real Realists and What They Tell Us About Judicial Decisionmaking and Legal Education*, 109 MICHIGAN LAW REVIEW 863 (2011).

Edward Rubin and Malcolm Feeley, *Creating Legal Doctrine,* 69 SOUTHERN CALIFORNIA LAW REVIEW 1989 (1996).

Abigail C. Saguy, WHAT IS SEXUAL HARASSMENT? FROM CAPITOL HILL TO THE SORBONNE (2003).

Wayne A. Santoro and Gayle M. McGuire, *Social Movement Insiders: The Impact of Institutional Activists on Affirmative Action and Comparable Worth Policies*, 44 SOCIAL PROBLEMS 503 (1997).

Austin Sarat, *Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship, in* Austin Sarat, ed., THE BLACKWELL COMPANION TO LAW & SOCIETY 1, 8 (2004).

Austin Sarat, *State Transformation and the Struggle for Symbolic Capital, in* Austin Sarat and Stuart Scheingold, eds., CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (2001).

Austin Sarat and Stuart Scheingold, CAUSE LAWYERS AND SOCIAL MOVEMENTS (2006).

Austin Sarat and Stuart Scheingold, CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (2001)

Austin Sarat and Stuart Scheingold, eds., CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (1998).

Frederick Schauer, *Precedent*, 39 STANFORD LAW REVIEW 571 (1987).

Stuart Scheingold, THE POLITICS OF RIGHTS (1974).

Margo Schlanger*, Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICHIGAN LAW REVIEW 1994 (1999).

Jeffrey A. Segal and Harold J. Spaeth, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

Caroll Seron and Susan S. Silbey, *Profession, Science and Culture: An Emergent Canon of Law and Society Research*, *in* BLACKWELL COMPANION TO LAW & SOCIETY 30, 32(1984).

Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts*, *in* Austin Sarat and Stuart Scheingold, eds., CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (1998).
Martin Shapiro, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

Martin Shapiro and Alex Stone Sweet, ON LAW, POLITICS, AND JUDICIALIZATION (2002).

Reva B. Siegal, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the ERA,* 94 CALIFORNIA LAW REVIEW 1323 (2006).

Jonathan Simon, *"The Long Walk Home" to Politics,* 26 LAW AND SOCIETY REVIEW 923 (1992).

John D. Skretney, THE MINORITY RIGHTS REVOLUTION (2002).

David A. Snow, *Framing Processes, Ideology, and Discursive Fields, in* David A. Snow, et al, eds., THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 380 (2004).

Donald R. Songer, *Consensual and Nonconsensual Decisions in Unanimous Opinions of the United States Court of Appeals*, 26 AMERICAN JOURNAL OF POLITICAL SCIENCE 225 (1982).

Donald R. Songer, Jeffrey A. Segal, Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AMERICAN JOURNAL OF POLITICAL SCIENCE 673 (1994).

Donald R. Songer and Susan Haire, *Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AMERICAN JOURNAL OF POLITICAL SCIENCE 963 (1992).

Ann Southworth, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008).

Harold J. Spaeth and Jeffrey A. Segal, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999).

Suzanne Staggenborg, *The Consequences of Professionalization and Formalization in the Pro-Choice Movement*, 53 AMERICAN SOCIOLOGICAL REVIEW 585 (1988).

David Strang and Sarah A. Soule, *Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills*, 24 ANNUAL REVIEW OF SOCIOLOGY 265 (1998).

Fred Strebeigh, EQUAL: WOMEN RESHAPE AMERICAN LAW (2009).

Cass R. Sunstein, David Schadke, and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation,* 90 VIRGINIA LAW REVIEW 301 (2004).

Brian Z. Tamanaha, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010).

Nadine Taub, *On Becoming a Feminist/Lawyer, in* THE FEMINIST MEMOIR PROJECT: VOICES FROM WOMEN'S LIBERATION 304 (1998)

Emerson H. Tiller and Frank B. Cross, *What Is Legal Doctrine?* 100 NORTHWESTERN UNIVERSITY LAW REVIEW 517 (2006).

Sheila Tobias, FACES OF FEMINISM: AN ACTIVIST'S REFLECTIONS ON THE WOMEN'S MOVEMENT 86 (1998).

Christopher van den Bulte and Gary L. Lillien, *Medical Innovation Revisited: Social Contagion versus Marketing Effort*, 106 AMERICAN JOURNAL OF SOCIOLOGY 1409 (2001).

Stanley Wasserman and Katherine Faust, SOCIAL NETWORK ANALYSIS: METHODS AND APPLICATIONS (1994).

Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AMERICAN UNIVERSITY LAW REVIEW 1 (1999).

Lucie White, *Two Worlds of Ghanian Cause Lawyers, in* Austin Sarat and Stuart Scheingold, CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (2001).

Keith Whittington, *Once More Into the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOCIAL INQUIRY 601 (2000).

Raymond Wolters, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION AND BLACK CIVIL RIGHTS (1996).

Frances F. Zemans, Legal Mobilization: The Neglected Role of the law in the Political System, 77 AMERICAN POLITICAL SCIENCE REVIEW 690 (1983).

Kathrin S. Zippel, THE POLITICS OF SEXUAL HARASSMENT: A COMPARATIVE STUDY OF THE UNITED STATES, THE EUROPEAN UNION, AND GERMANY (2006).

APPENDIX 1: COURT OF APPEALS CASES IN DATASET

ID	Case Name	Citation	Circuit	State	Year
1	Garber v. Saxon Business Prod., Inc.	552 F.2d 1032	4th Circuit	VA	1977
2	Barnes v. Costle	561 F.2d 983	DC Circuit	DC	1977
3	Tomkins v. Public Svc. Elec. & Gas Co.	568 F.2d 1044	3d Circuit	NJ	1977
4	Pantchenko v. CB Dolge Co.	581 F.2d 1052	2d Circuit	CT	1978
5	Miller v. Bank of America	600 F.2d 211	9th Circuit	CA	1979
6	Bundy v. Jackson	641 F.2d 934	DC Circuit	DC	1981
7	Henson v. City of Dundee	682 F.2d 897	11th Circuit	FL	1982
8	Katz v. Dole	709 F.2d 251	4th Circuit	DC	1983
9	Phillips v. Smalley Maint. Services	711 F.2d 1524	11th Circuit	AL	1983
10	Craig v. Y&Y Snacks	721 F.2d 77	3d Circuit	PA	1983
11	Barrett v. Omaha Nat. Bank	726 F.2d 424	8th Circuit	NE	1984
12	Bouchet v. National Urban League	730 F.2d 799	DC Circuit	DC	1984
13	Simmons v. Lyons	746 F.2d 265	5th Circuit	LA	1984
14	Vinson v. Taylor	753 F.2d 141	DC Circuit	DC	1985
15	Horn v. Duke Homes	755 F.2d 599	7th Circuit	IN	1985
16	McKinney v. Dole	765 F.2d 1129	DC Circuit	DC	1985
17	Mays v. Williamson & Sons	775 F.2d 258	8th Circuit	AR	1985
18	Bell v. Crackin Good Bakers, Inc.	777 F.2d 1497	11th Circuit	GA	1985
19	Moylan v. Maries County	792 F.2d 746	8th Circuit	MO	1986
20	Jones v. Flagship International	793 F.2d 714	5th Circuit		1986
21	Scott v. Sears, Roebuck & Co.	798 F.2d 210	7th Circuit	IL	1986

22	Bohen v. City of East Chicago	799 F.2d 1180	7th Circuit	IN	1986
23	Rabidue v. Osceola Refining Co.	805 F.2d 611	6th Circuit	MI	1986
24	Highlander v. KFC National Mgmt. Co.	805 F.2d 644	6th Circuit	OH	1986
25	Faris v. Henry Vogt Machine Co.	813 F.2d 786	6th Circuit	KY	1987
26	Yates v. Avco Corp.	819 F.2d 630	6th Circuit	TN	1987
27	Boddy v. Dean	821 F.2d 346	6th Circuit	TN	1987
28	Dornhecker v. Malibu Grand Prix Corp.	828 F.2d 307	5th Circuit	TX	1987
29	Sparks v. Pilot Freight Carriers	830 F.2d 1554	11th Circuit	GA	1987
30	Swenkek v. USAir, Inc.	830 F.2d 552	4th Circuit		1987
31	Hicks v. Gates Rubber Co.	833 F.2d 1406	10th Circuit	CO	1987
32	Sheehan v. Purolator, Inc.	839 F.2d 99	2d Circuit	NY	1988
33	Long v. Laramie Community College	840 F.2d 743	10th Circuit	WY	1988
34	Hall v. Gus Construction Co., Inc.	842 F.2d 1010	8th Circuit	IA	1988
35	Bennett v. Corroon & Black Corp.	845 F.2d 104	5th Circuit	LA	1988
36	Volk v. Coler	845 F.2d 1422	7th Circuit	IL	1988
37	Huddleston v. Roger Dean Chevrolet	845 F.2d 900	11th Circuit	FL	1988
38	Jones v. Wesco Investments	846 F.2d 1154	8th Circuit	MO	1988
39	Jordan v. Clark	847 F.2d 1368	9th Circuit	AK	1988
40	Gray v. County of Dane	854 F.2d 179	7th Circuit	WI	1988
41	Lipsett v. University of Puerto Rico	864 F.2d 881	1st Circuit	PR	1988
42	Steele v. Offshore Shipbuilding, Inc.	867 F.2d 1311	11th Circuit	FL	1989
43	Dwyer v. Smith	867 F.2d 184	4th Circuit	VA	1989
44	Staton v. Maries County	868 F.2d 996	8th Circuit	MO	1988

45	Manders v. State of Oklahoma	875 F.2d 263	10th Circuit	OK	1989
46	Waltman v. International Paper Co.	875 F.2d 468	5th Circuit	LA	1989
47	Starrett v. Wadley	876 F.2d 808	10th Circuit	OK	1989
48	Ebert v. Lamar Truck Plaza	878 F.2d 338	10th Circuit	CO	1989
49	Paroline v. Unisys Corp.	879 F.2d 100	4th Circuit	VA	1989
50	EEOC v. Hacienda Hotel	881 F.2d 1504	9th Circuit	CA	1989
51	Brooms v. Regal Tube Co.	881 F.2d 412	7th Circuit	IL	1989
52	Swanson v. Elmhurst Chrysler Plymouth, Inc.	882 F.2d 1235	7th Circuit	IL	1989
53	Wyerick v. Bayou Steel Corp.	887 F.2d 1271	5th Circuit	LA	1989
54	Carerro v. NY City Housing Auth.	890 F.2d 569	2d Circuit	NY	1989
55	Spencer v. General Electric Co.	894 F.2d 651	4th Circuit	VA	1990
56	Andrews v. City of Philadelphia	895 F.2d 1469	3d Circuit	PA	1990
57	King v. Regents of Univ. of Wisc.	898 F.2d 533	7th Circuit	WI	1990
58	Morgan v. Mass. General Hospital	901 F.2d 186	1st Circuit	MA	1990
59	Baker v. Weyerhaeuser Co.	903 F.2d 1342	10th Circuit	OK	1990
60	Ramsery v. City and County of Denver	907 F.2d 1004	10th Circuit	CO	1990
61	Vasconcelos v. Meese	907 F.2d 111	9th Circuit	CA	1990
62	Dockter v. Rudolph Wolff Futures	913 F.2d 456	7th Circuit	IL	1990
63	Guess v. Bethelehem Steel Corp.	913 F.2d 463	7th Circuit	IN	1990
64	Chamberlin v. 101 Realty, Inc.	915 F.2d 777	1st Circuit	NH	1990
65	Trautvetter v. Quick	916 F.2d 1140	7th Circuit	IN	1990
66	Hirschfeld v. New Mexico Dept. Corrections	916 F.2d 572	10th Circuit	NM	1990

67	Ellison v. Brady	924 F.2d 872	9th Circuit	CA	1991
68	Hicks v. Gates Rubber Co.	928 F.2d 966	10th Circuit	CO	1991
69	Collins v. Baptist Memorial Geriatric Ctr.	937 F.2d 190	5th Circuit	TX	1991
70	Wilson v. Zapata Off-Shore Company	939 F.2d 260	5th Circuit		1991
71	Reed v. Shepard	939 F.2d 484	7th Circuit	IN	1991
72	Buskus v. Southwestern Bell	951 F.2d 946	8th Circuit	AR	1991

APPENDIX 2: DISTRICT COURT CASES IN DATASET

Citation	Case Name	U.S. District	State	Year Decided
13 FEP Cases 123	Barnes v. Train	D.D.C.	DC	1974
390 F.Supp. 161	Corne v. Bausch & Lomb, Inc.	D.Ariz.	AZ	1975
413 F.Supp. 654	Williams v. Saxbe	D.D.C.	DC	1976
418 F.Supp. 233	Miller v. Bank of America	N.D. Cal.	CA	1976
422 F.Supp. 553	Thompkins v. Public Service Elec. & Gas Co.	D.N.J.	NJ	1976
441 F.Supp. 459	Munford v. James T. Barnes & Co.	E.D. Mich.	MI	1977
459 F.Supp. 1	Alexander v. Yale Univ.	D. Conn.	CT	1977
461 F.Supp. 894	Kyriazi v. Western Electric	D.N.J.	NJ	1978
451 F.Supp. 1382	Heeley v. Johns-Manville Corp.	D.Colo.	CO	1978
446 F.Supp. 704	Stringer v. Com. of Pa.	D.Pa.	PA	1978
1978 WL 126	Smith v. Rust Engineering	N.D.Ala.	AL	1978
17 FEP Cases 482	Neely v. American Fidelity Insur.	W.D. Okla.	OK	1978
19 FEP Cases 828	Bundy v. Jackson	D.D.C.	DC	1979
21 FEP Cases 452	Neidhardt, et al v.	ED La.	LA	1979

	Holmes Co.			
22 FEP Cases 1627	Brown v. City of Guthrie, Okl.	W.D. Okla.	OK	1980
23 FEP Cases 37	Vinson v. Taylor	D.D.C.	DC	1980
27 FEP cases 21	Halpert v. Wertheim & Co.	S.D.N.Y.	NY	1980
511 F.Supp. 307	Wright v. Methodist Youth Services	D.Ill.	IL	1981
518 F.Supp. 521	Guyette v. Stauffer Chem. Co.	D.N.J.	NJ	1981
542 F.Supp. 123	Sones Morgan v.	D.Tenn.	TN	1981
27 FEP Cases 66	Hill v. BASF Wyandotte Corp.	E.D. Mich.	MI	1981
518 F.Supp. 1309	Walter v. KFGO Radio	D.N.D.	ND	1981

APPENDIX 3: VARIABLES CODED IN COURT OF APPEALS DATASET

Category	Name	Description	Type	Values	Source	DATA SETS USED IN		
						Votes	Cases	Citations
Identifying	ID	Unique identfier	Case	1 to 72	Assigned in cite order	Y	Y	Y
	Vote	Differentiates ivotes on each case	Judge Vote	1 to 3	Assigned to each vote in each case	Y	N	N
	Cite	Citation	Case	unique	Case coding	Y	Y	Y
	Case Name	Name of case	Case	unique	Case coding	N	Y	Y
	Node	Identification of nodes for network analysis	Case, Link	ID # plus case name	Assigned based on ID and name	N	N	Y
Location	Circuit	Circuit deciding case	Case	1 to 12 (DC = 12)	Case coding	Y	Y	N
	State	State case was litigated in	Case	state 2 ltr. postal codes	Case coding	Y	Y	N
Time	Year Decided	Year of decision	Case	1977 - 1991	Case coding	N	Y	Y
	Elapsed Year	Conversion of decision years to elapsed years	Case	1 to 15	Converted from Year Decided	Y	Y	N
	Post Meritor	Ruling was post-Meritor	Case	1 for yes, 0 for no	link coding	Y	Y	Y

Plaintiff	Plaintiff Type	Whether single or multi-plaintiff	Case	Single, Multi, Class	Case coding	N	Y	N
	GovOrg Support	Whether EEOC or organization appeared as amicus or party for plaintiff	Case	1 for yes, 0 for no	Case coding	Y	Y	Y
Judge	Judge GHP Score	Giles Hettinger Pepper judicial ideology score	Judge	from -1 (most liberal) to +1 (most conservative)	Matched from external database	Y	Y	N
	Reagan Appt	Whether Pres. Reagan appointed judge	Judge	1 for yes, 0 for no	Assigned based on FJC bio data	Y	N	N
Panel	Panel Ideo	Average GHP score of panel	Case	from -1 (most liberal) to +1 (most conservative)	Calculated average of individual judge scores	N	Y	N
	Dem Panel	Whether panel a majority of Democratic appointed judges	Case	1 for yes, 0 for no	Assigned based on judge data	N	N	Y
Procedure	Factfinding	Whether decision is based on trial or summary adj.	Case	1 for trial, 0 for Mot to Dismiss or Summary J	Case coding	Y	Y	N

Opinion	Dissent	Whether there was a dissent	Case	1 for yes, 0 for no	Case coding	N	Y	N
	Concur	Whether there was a concurrence	Case	1 for yes, 0 for no	Case coding	N	Y	N
	Opin Type	Judicial opinion	Judge	Majority-Author, Majority-Join Per Curiam, Dissent, Concur	Case coding	Y	N	N
Legal Issues	Quid Pro Quo	Whether plaintiff raised quid pro quo claims	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Hostile WE	Whether plaintiff raised hostile work environment claims	Case	1 for yes, 0 for no	Case coding	Y	Y	N
Citation of Authority	EEOC Guidelines	Whether case cited or relied on EEOC guidelines	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Meritor Cite	Whether case cites Meritor decision	Case	1 for yes, 0 for no	Assigned based on link coding data	Y	Y	N
	Race Bridge	Whether case cites prior race discrimination cases	Case	1 for yes, 0 for no	Assigned based on link coding data	Y	Y	Y

Claims	Because of Sex	Whether because of sex an issue	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Unwelcome	Whether unwelcomeness an issue	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Severe Pervasive	Whether severe or pervasive an issue	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Damages	Whether damages an issue	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Factual or Procedural	Whether factual or procedural defense raised	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Tangible Employ. Action	Whether tangible employment action an issue	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Agency	Whether agency an issue	Case	1 for yes, 0 for no	Case coding	Y	Y	N
	Defense not agency	Whether case determined sufficiency of a defense, excluding cases involving agency only	Case	1 for yes, 0 for no	Calculated based on case coding	Y	Y	N

Outcomes	Winner	Who won in Court of Appeals	Case	1 for plaintiff, 0 for defendant	Case coding	Y	Y	N
	Judge Vote	Who Judge voted for	Judge Vote	1 for plaintiff, 0 for defendant	Case coding	Y	Y	N
	Win Below	Who won in District Court	Case	1 for plaintiff, 0 for defendant	Case coding	Y	Y	N
Network Location/ Centrality	Cluster Coeff	Network position measure	Case	Continuous from 0 to 1	Calcuated from network data	N	N	Y
	Eigen Cent	Network position measure	Case	Continuous from 0 to 1	Calcuated from network data	N	N	Y
	Between Cent	Network position measure	Case	Continuous from 0 to 1	Calcuated from network data	N	N	Y
	Close Cent	Network position measure	Case	Continuous from 0 to 1	Calcuated from network data	N	N	Y
	Eccentricity	Network position measure	Case	Continuous from 0 to 1	Calcuated from network data	N	N	Y
Network Rank or Prestige	InDegree	# of cases citing this case	Case	Number from 1 to n	Calcuated from network data	N	N	Y
Network Reliance	OutDegree	# of cases this case cites	Case	Number from 1 to n	Calcuated from network data	N	N	Y
Network Score	Degree	# of links to all cases	Case	Number from 1 to n	Calc.from network data	N	N	Y

Edge List Variables	Source	Citing case	Link	unique ID plus name	Assigned based on ID and name	N	N	Y
	Label	Name of citing case	Case, Link	unique	Case coding	N	N	Y
	Target	Cited case	Link	unique ID plus name	Assigned based on ID and name	N	N	Y
	Cite Class	Type of citation	Link	1 for pro plaintiff cite, 2 for general/netrual cite, 3 for pro defendant cite	Link coding	N	N	Y

TIMELINE OF SIGNIFICANT EVENTS

1968 NOW Bill of Rights (does not include sexual harassment)

1971 5th Circuit rules racial harassment violates Title VII (*Rogers v. EEOC*)

Paulette Barnes files a discrimination charge against her agency

1972 Amendments to Title VII

1974 Earliest known ruling in sexual harassment case – plaintiff loses (*Barnes v. Train*)

1975 Ithaca, NY feminists coin term "sexual harassment," found Working Women United

EEOC files brief in support of sexual harassment plaintiff – plaintiff loses (*Corne v. Bausch & Lomb*)

Eleanor Holmes Norton chairs NY City Human Rights Commission Hearing on Sexual Harassment

NY Times article on sexual harassment

1976 Alliance Against Sexual Coercion founded in Massachusetts

1977 Houston Women's Rights Conference – no mention of sexual harassment in adopted resolution on employment

Women comprise 41% of the labor force; nearly half of all women over age 16 are employed (US Dept of Labor *Handbook on Women Workers*)

Ms. Magazine Cover story on sexual harassment

First appellate decisions – DC, 3rd and 4th Circuits rule sexual harassment violates Title VII, all reversing lower courts, (*Barnes v. Costle, Tomkins v. Public Service Elec. & Gas, Graber v. Saxon Industries*), 9th Circuit vacates *Corne*.

1978 DOL regulations address sexual harassment by federal contractors

1979 Publication of *The Sexual Harassment of Working Women*

U.S. House of Representatives Hearings on Sexual Harassment

9th Circuit rules that sexual harassment violates Title VII (*Miller v. Bank of Amer.*)

1980 EEOC issues guidelines on hostile work environment harassment

9 to 5 addresses, but does not mention, sexual harassment

Ronald Reagan elected President

1981 Senate Hearings on Sexual Harassment
EEOC begins to collect charging data; over 3400 charges filed in first year post-Guidelines

OMB requests review of Guidelines

1982 Clarence Thomas becomes Chair of the EEOC

EEOC declines to review guidelines

1986 Supreme Court rules in *Meritor*

1988 Reagan leaves office after appointing half of current federal appellate judges

1991 Civil Rights Act of 1991 passes

Hill-Thomas Hearings