

Feminism Without *Roe*

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Abstract:

Abortion has made an indelible mark in American history. When the Supreme Court overturned *Roe* and *Casey* in *Dobbs*, feminists' legal legacy seemed in ruins. In response, activists have incessantly and fiercely fought to defend women's right to abortion. However, playing defensive has left little room for other feminist demands. This piece is a historical reminder that it need not be that way.

Indeed, rich and capacious feminist activism has been—and remains—possible without *Roe*. In this article, I offer a note of hope through a history of feminists' legal imaginaries. I revisit activists' projects during the 1960s and 1970s and describe a moment of “feminist freedom” in which feminists' legal imaginary was wide open. Conscious of that time's diverse feminist milieu, the article focuses especially on the National Organization for Women (NOW)—the largest and most moderate feminist organization—, whose members creatively used the law as a toolkit to pursue a new social order. For NOW, bringing women into the American mainstream meant revolutionizing social and economic structures to overcome gender oppression (through popular day cares, legislative demands, labor groups, media pressure efforts, etc.). This is the story of how a previously marginal aspect of feminists' fight for freedom displaced the constellation of demands that once undergirded their quest. I show that during the 1970s abortion was simply not feminists' foremost demand and, to the extent it was, it was uttered in quite different terms. Abortion was one more instance in which women reclaimed their freedom, tightly connected to other questions of social and economic equality.

* J.S.D., University of Chicago. This Article was born out of my J.S.D. and History Ph.D. research, and I am grateful for the generous feedback and support of colleagues, friends, and mentors. All mistakes remain my own. I am deeply thankful to Alison LaCroix, Gabriel Winant, Genevieve Lakier, Laura Weinrib, Rashauna Johnson, Juan Wilson, Kate Reed, Daniel Ferreira, and Linda Zerilli for their encouragement and critical comments on several versions of this work. I also want to thank Tara Zahra, Jon Levy, Shih-An Wang, Brigitte McFarland, Malavika Parthasarathy, William Hubbard, Jonathan Green, Joanna Grossman, Mary Ziegler, Deborah Dinner, and Felicia Kornbluh for their generous feedback on the issues this paper addresses. This research was supported by funding from the University of Chicago and the Schlesinger Library. I want to express my gratitude for the professionalism and warmth of the Schlesinger's staff. I am indebted to Kirti Manwani, Deepak Punjwani, and Nathaly Hadwa for welcoming me into their homes for parts of my research and to the indispensable care work performed by my family that—in every way—made this paper possible. Finally, I thank Lucas Miller and Max Hall for their close editing work.

The Article traces how activists shifted from a capacious and multifaceted legal imaginary (during “feminist freedom”) onto abortion as a single issue (giving rise to “Roe feminism”). In the process, not only did activists’ agendas change but the very grammar of abortion was transformed as it increasingly became a stand-alone demand. Throughout this transition, feminists did not merely follow external pressures when they partook in a single-issue fight for abortion. For that move to be possible, activists needed to first re-align behind the Equal Rights Amendment (ERA). The ERA was uniquely situated to become feminists’ single-issue because of its historical significance and its ability to address sex discrimination in multiple areas. Thus, when the ERA’s clock ran out, NOW turned to abortion as the issue that condensed all other issues. Inadvertently, with it, activists reimagined their aspirations as matters of choice, devoid of the material conditions that had for so long loomed in their political imaginary. Recovering this history is imperative in a world without Roe, not least because it reminds us of the myriad ways in which the law remains to be found as a tool for feminist change.

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I. INTRODUCTION

It would be just a slight exaggeration to say that every public discussion about feminist demands in the United States starts (and perhaps even ends) with abortion. For decades, the “right to choose” has stood as feminism’s

most conspicuous demand. At the same time, abortion represents broader questions about women's autonomy and self-determination. Despite criticism from reproductive justice advocates¹—who consider the right to choose to be too limited—abortion remains a metonymy for feminism in public discourse.² Perhaps even more so after the Supreme Court cut *Roe's*

¹ The advent of “Reproductive Justice” in the late 1990s pushed back on the narrowness of abortion as a stand-alone demand. The founders and proponents of the framework were: Toni M. Bond Leonard, Reverend Alma Crawford, Evelyn S. Field, Terri James, Bisola Marignay, Cassandra McConnell, Cynthia Newbille, Loretta Ross, Elizabeth Terry, “Able” Mable Thomas, Winnette P. Willis, Kim Youngblood. *RJ Founding Mothers*, BLACK WOMEN FOR REPRODUCTIVE JUSTICE (Aug. 8, 2012), <https://bwrij.wordpress.com/2012/08/08/151> [<https://perma.cc/NKQ8-F2FN>]. Overall, the Reproductive Justice movement struggled to open the feminist agenda by incorporating larger economic considerations through the language of human rights, linking together the fight for reproductive rights and social justice. The earliest organization to use the term was SisterSong, founded in 1997, though the term had been coined by some of the organization's founders three years earlier.

The Reproductive Justice framework pushes for a more capacious version of reproductive rights which includes not only the right to have, or not have children but also that to “parent them in safe and healthy environments.” See LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* 9 (2017). Nonetheless, the consideration of the issue in terms of individual rights, to an important extent focused on attending individual situations and grievances, as opposed to structural conditions and how to re-structure our communities, restraints the kinds of answers we dispose of. Today, reproductive Justice groups include, among others, SisterSong, The Afiya Center, Black Mamas Matter Alliance, In Our Own Voice: respectively <https://www.sistersong.net> [<https://perma.cc/RLR6-GWNZ>], <https://www.theafiyacenter.org> [<https://perma.cc/FT4L-U8PA>], <https://blackmamasmatter.org> [<https://perma.cc/5VYE-REMT>].

² Admittedly, in some respects at least, reproductive justice and its more ambitious platform has become mainstream. As legal scholar Melissa Murray has noted: in 2004, NOW's conference featured reproductive justice programming, and “[b]y 2016, NOW's platform had a decidedly reproductive justice cast.” Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 *HARV. L. REV.* 2025, 2055–56 (2021). It is debatable whether reproductive justice provides an adequate framework to confront structural conditions of oppression. For the present discussion, suffice it to note that it is the most capacious approach currently available.

In that sense, despite reproductive justice's recent popularization, feminist organizations continue to focus overwhelmingly on abortion. At most, they include other issues rather than redefining their agendas towards a comprehensive approach that includes abortion access as one more instance of women's freedom. For example, in a newspaper response to Republican Marie Fischer, NOW president Christian Nunes stressed the strong link between abortion and poverty by compellingly emphasizing poor women are the most affected by abortion bans. Christian F. Nunes, *Abortion Is About All of Us*, *DC J.* (Oct. 26, 2022), <https://dcjournal.com/point-abortion-is-about-all-of-us> [<https://perma.cc/UQ2A-WPBN>].

Nonetheless, Nunes's remarks narrowed the discussion to abortion alone without calling for a transformation of the underlying conditions that led to that situation.

life short with *Dobbs*, as activists tripled efforts to fight back. But as they bravely refused to lose the fight for the right to choose, they inadvertently contributed to make abortion *the* feminist demand, instead of *a* feminist demand. In a world without *Roe*, can we only play defense? What are feminists' possibilities in this new legal arena? This Article will answer these questions with a note of historical hope, by rethinking a moment in which feminist legal imaginary spanned beyond choice and the single-issue debate.

Since the Supreme Court in *Dobbs* overturned *Roe* and *Casey*,³ stripping pregnant people of the constitutional protection of their right to abortion, recovering this story has become especially imperative. Revisiting past feminist legal visions and their demise may allow activists to reinvigorate lost perspectives beyond the familiar discussion of abortion as the foremost reflection of women's autonomy.⁴ It may serve as a historical reminder that there is, and there was, much feminism without *Roe*, and there can still be if we dare to push for it.

To be sure, access to abortion is critical. Feminist activists who dedicate their lives to securing and protecting women's right to access abortions carry out a momentous task. Having to resort to interstate travel—economically inaccessible for many—dangerous back-alley abortions or be faced with the threat of incarceration is abhorrent. Nevertheless, no matter how dense the symbolic power of abortion is in contemporary American politics, as a standalone demand, much of that power remains purely rhetorical as it is inapt to transform the disadvantageous structural conditions American women continue to endure.

Legal and historiographical accounts and reflections on *Roe* have been numerous and substantial. Broadly speaking, *Roe* has figured prominently in discussions over the democratic adequacy of judicial review and as part of a

See id. Nunes wrote, "According to the Guttmacher Institute, 75 percent of women who seek abortion services are low-income and financial insecurity is the most commonly cited reason women seek abortion care" to this fact, she added that "*Women can't fully participate in our workforce or make the critical economic contributions this country needs* if they are forced to carry unintended — or non-viable — pregnancies against their will." *Id.* (emphasis added). Nunes omitted from the equation the conflating factors that obstruct women's decisional possibilities as issues that need urgent attention: lack of childcare, healthcare, affordable housing, economic security, etc. *See id.* Instead, she focused on women's individual possibilities to contribute as productive agents to the national economy, obscuring the gendered forms of valorization over what counts as a productive activity and the wage gap that persists even within remunerated occupations. *Id.* This is not to say that abortion bans are not tremendously harmful to pregnant people. Instead, I want to emphasize how reproductive justice approaches do not yet ground mainstream feminist organization's common sense.

³ *See generally* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

⁴ This is not to say, that there has been no feminist reflection outside the right to choose framework but to stress how pervasive that framework has remained. Interestingly, efforts to broaden the scope of considerations rightly charge contemporary mainstream feminists with underplaying economic factors. *See generally* MIKKI KENDALL, HOOD FEMINISM (2020).

wider reflection on rights and their institutional significance.⁵ More specifically, legal scholars Robert Post and Reva Siegel have complicated the backlash narrative that presumed that *Roe* instantly caused a broad-based conservative counterattack by showing that mobilization against abortion preceded the decision and intensified slowly throughout the decade that followed.⁶ Mary Ziegler, on her part, has shown that the rise of *Roe* was not just a passive reaction to the decision, demonstrating it was due in no small part to the choices activists across the political spectrum actively made to make “the abortion battle a central part of their lives.”⁷ Beyond that, legal

⁵ There are multiple works that have reflected on the nature and suitability of the role of the judiciary in the United States’ democratic scheme. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 19–25 (1999) (making a case against judicial review for democratic considerations); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 177 (2000) (arguing in favor of a populist constitutional conversation in which the judiciary holds no institutional privilege grounded on a minimum set of agreed upon values he calls the “thin” constitution); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 12–25 (2007) (arguing through a comparative analysis that the rise of judicial review—and judicial supremacy—is the product of elitist efforts to insulate policymaking from politics); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1370–75 (2006) (arguing individual rights are not necessarily better protected by justices than by democratic legislators as long as a series of conditions are met); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L. L. REV.* 373, 380 (2007) (making a case for a dialogical institutional approach to judicial review that “examines the many practices that facilitate an ongoing and continuous communication between courts and the public”); Richard H. Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 *HARV. L. REV.* 1693, 1735–36 (2008) (arguing that under certain—likely—circumstances judicial review can better serve rights’ protection given that the judiciary appears to be better placed “to apprehend serious risks to some kinds of fundamental rights [and] that errors that result in the violation of fundamental rights are typically more morally disturbing than errors that result in the erroneous overenforcement of fundamental rights”); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *HARV. L. REV.* 191, 243 (2008) (using *Heller* to argue originalist interpretations can nonetheless participate of a responsive process of democratic constitutionalism and exposing how “constitutional politics can guide and discipline judicial review”); Pamela S. Karlan, *Democracy and Disdain*, 126 *HARV. L. REV.* 1, 66, 68 (2012) (discussing the potential dangers of an institutional mechanism that selects judges through “a highly partisan, consciously ideological process” and where the Supreme Court’s skepticism towards other branches of government and its “disdain for democracy” breaks with previous judicial traditions); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 *VAND. L. REV.* 769, 773 (2022) (revisiting the conjectures on which John Hart Ely’s defense of judicial review rested—superior institutional capacity to protect minorities and the democratic process—to argue they do not hold and thus democratic confidence is better placed in the legislatures than the courts offering “more democratic approaches to democracy’s pathologies”); see also Michael J. Klarman, *The Degradation of American Democracy—And the Court*, 134 *HARV. L. REV.* 1, 8 (2020) (arguing that the conservative majority of the Supreme Court has played a significant role in the degradation of American democracy, particularly on matters of democratic governance).

⁶ See Post & Siegel, *supra* note 5.

⁷ MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 23 (2015).

historians have said little about the impact the decision had on existing forms of feminist activism.⁸ Though feminist scholars have engaged in rich discussions over the limits of rights and, alternatively, over the shortcomings of women's rights as currently understood, they have not done so directly engaging with feminists' projects without *Roe*.⁹ Put differently, while there have been numerous accounts of how "the abortion wars" came to be, less attention has been placed on how feminist activists on the ground experienced, claimed, and presented feminist projects and their changing relation to *Roe*.

The Article proceeds in three parts. Part I, *Feminist Freedom*, will present the visions feminists espoused during the 1960s and 1970s, arguing they challenged the structural conditions that relegated women to second-class citizenship.¹⁰ Without shying away from the class and racial tensions activists

⁸ With the notable exception of Mary Ziegler and Melissa Murray. Mary Ziegler has referred to feminist activists' changing strategies in courts, but has not focused on their priorities and plans and how they changed throughout the 1960s and 1990s. *See generally id.*; Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 L. & HIST. REV. 281 (2009). Melissa Murray has documented the history of race, feminism and abortion and how *Roe* affected them. *See* Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025, 2040 (2021).

⁹ Feminist critiques of rights' contradictions and shortcomings have taken different forms. Critics of the political usefulness of rights have stressed their inability to quarrel with oppressive structural conditions. *See, e.g.*, Dean Spade, *Intersectional Resistance and Law Reform*, 38 J. WOMEN CULTURE & SOC'Y 1031 (2013); Wendy Brown, *Suffering the Paradoxes of Rights*, in LEFT LEGALISM/LEFT CRITIQUE 420 (Wendy Brown & Janet Halley eds., 2002) (exploring the paradoxes of liberal rights and their inability to address the conditions of despair and violence that intersectional resistances seek to transform). Within legal academia, without disavowing rights, feminist scholars have posed necessary critiques on the shortcomings of women's rights (as particularly defined in American constitutional doctrine). *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1006 (2002) (critiquing the prevailing narrow reading of the Nineteenth Amendment); Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U.L.Q. 161 (1979) (favoring the Equal Protection Clause doctrine as a better rationale for women's rights than privacy). Further, scholars have reflected on what the possibilities of rights could be if imagined differently. For example see Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 YALE L.J.F. 343 (2019) and Gayle Binion, *Human Rights: A Feminist Perspective*, 17 HUM. RTS. Q. 509 (1995), for a constitutional intersectional proposal *de lege ferenda*.

¹⁰ I have opted for an ad hoc periodization instead of the ubiquitous waves metaphor to emphasize the shared richness of legal imaginaries across a varied set of feminist iterations without discounting earlier efforts that do not fit the waves narrative. The wave metaphor suggests that only throughout the waves was feminist activism alive and pungent. But significant feminist activism took place beyond the narrow periods the waves highlight. For instance, as Dorothy Sue Cobble has compellingly shown, labor feminists played an important role during the 1940s and any history of American feminism that occludes it is missing a key aspect of feminists' trajectories. *See generally* DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* (2005). *See* Leela Fernandes, *Unsettling "Third Wave Feminism": Feminist Waves, Intersectionality, and Identity Politics in Retrospect*, in NO PERMANENT WAVES 98 (Nancy Hewitt ed., 2010), and Kathleen A.

had to confront, it will present the many ways in which feminists contested what public and private life ought to look like, deploying the law in creative ways to imagine a different world. During that initial phase, feminists' legal imagination was wide open, as activists utilized laws' many tools creatively to articulate and re-articulate social and economic structures.¹¹ Parts I.A, I.B, and I.C will address the National Organization for Women (NOW), the National Welfare Rights Organization, and the Wages for Housework New York campaign, respectively. Part I.D will then read those organizational efforts as part of a broader feminist discussion.

Part II, Abortion as a *Feminist Freedom*, will expose in Part II.A how abortion was simply not feminists' central demand and that—as part of a larger agenda—it was uttered in terms radically different from those familiar to us today. Part II.B will show that *Roe* was not particularly significant for NOW when it came out, nor did it immediately shift abortion's relative position amid other feminist demands. Parts I and II encompass the period in which feminism existed without *Roe v. Wade*. During that period, the decision's absence from mainstream feminism was not temporal but substantive. *Roe* was simply not the pinnacle of feminist aspirations. Instead, feminist activists searched for what Parts I and II refer to as *feminist freedom*.

Conversely, Part III will present what *Roe feminism* meant for NOW. It will trace the rise of *Roe* within feminist priorities. Part III.A will introduce a transitory phase that followed feminist freedom in which NOW concentrated its efforts on a single issue for the first time. As the ratification of the Equal Rights Amendment (ERA) became more difficult, activists set aside the large and varied legal tool kit they had previously used and concentrated on a single constitutional amendment, which promised to bring with it far-reaching

Laughlin et al., *Is It Time to Jump Ship? Historians Rethink the Waves Metaphor*, 22 FEMINIST FORMATIONS 76 (2010), for a critical view of the waves metaphor and its implied assumptions of feminist history as one of progressive inclusion to the ranks of white-middle-class activists. Although the term “second wave” has been reclaimed for more encompassing histories that consider welfare activists as well as liberal and radical feminists, its use continues to appeal to a narrative of feminist progressive inclusion that obscures important aspects of the processes this Article will address and fails to incorporate labor feminists into the story, a crucial precursor of NOW's vision. See KIRSTEN SWINTH, FEMINISM'S FORGOTTEN FIGHT: THE UNFINISHED STRUGGLE FOR WORK AND FAMILY (2018).

¹¹ I use “legal imaginary” in a way akin to Risa Goluboff's use of the terms “legal imagination” and “constitutional imagination” in *The Lost Promise of Civil Rights*. See generally RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2010). I take the idea to denote the potential contours of legal and constitutional concepts, values, principles, and institutions as envisioned and pushed forward by legal agents (in the broadest sense). The *Lost Promise* focuses on the NAACP, CRS and black claimants that appealed to them in search of legal support. See *id.* I will push the concept one step further, to refer to the legal and constitutional imaginaries (as visions) of feminist activists in the context of their priorities, discussions and agendas.

change. Part III.B will show how, when the ERA's (extended) deadline ran out, abortion and *Roe* ultimately filled the void left by the ERA in activists' new-fangled single-issue strategy. Thus, instead of an entire toolkit or a multifunctional instrument (like the ERA), feminists settled on a single, court-oriented tool that attained a central role in their legal imaginary. Part III.C will describe feminists' new legal imaginary. The Conclusion then reflects on the current state of the discussion, closing with an invitation to reconsider the possibilities this history suggests for feminist legal imaginaries.

While several feminist efforts could be considered to understand the scope of feminism before *Roe*, a comprehensive account exceeds this Article's scope (and space). Thus, while I will briefly engage with other groups, my focus will be NOW. The emphasis on NOW is justified by two key factors: first, it was the largest feminist organization; second, it was the most mainstream representative of feminist demands. Given NOW's status as the most moderate organization, it becomes a crucial case study, illustrating that even a mainstream group once embraced a more extensive and inclusive agenda. The narrowing of feminism following the *Roe* decision wasn't solely a result of radical groups fading away; it also signified a shift in the collective imagination across the entire political spectrum.

By placing NOW, the National Welfare Rights Organization, and others under the umbrella of *feminist freedom*, I do not intend to collapse the political, racial, and economic differences that divided these groups but to underscore their shared ways of processing and challenging gender oppression.¹² For all of these groups, redefining social norms, possibilities, and expectations was not just a matter of experimentation but a vital feminist quest for freedom. Whereas the familiar slogan "Sisterhood is Powerful" (associated with the women's liberation movement) has been commonly read to stress how (primarily middle-class) white women's sisterhood squashed out other experiences, it is worth focusing on the generative prospect of the different efforts as powerful sites of sisterhoods in the plural.¹³ The transformative potential of these sisterhoods lay precisely in the fact that women were

¹² Most of the groups I mention self-identified as feminists, with the notable exception of the National Welfare Rights Organization that only claimed the label in its last years, due to the racial and class assumptions that underlaid the category. But, as Nadasen has convincingly argued: "In addition to its rightful place within the black freedom movement, the welfare rights movement also represented a struggle by women for their autonomy and, therefore, can and should be defined as part of the women's movement of the 1960s." PREMILLA NADASEN, *WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES* xviii (2005). Kirsten Swinth's general history of the second feminist wave in the United States also incorporated the NWRO among its groups. See SWINTH, *supra* note 10.

¹³ See *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* (Robin Morgan ed., 1970). The phrase has been attributed to Kathie Sarachild who coined it for a 1969 pamphlet but was widely popularized through the anthology volume named after it edited by Robin Morgan. See BARBARA J. LOVE, *FEMINISTS WHO CHANGED AMERICA, 1963–1975* 405 (2006).

intentionally and massively—across the political spectrum and in different ways—taking matters into their own hands. They seized power by redefining societal expectations and possibilities through their collective action.¹⁴

I use “freedom” to describe the early period not only because its use was frequent among activists,¹⁵ but also because it denotes the double direction of feminist projects. Freedom entailed both freedom *from* patriarchal oppression and freedom *to* thrive as individuals *and* social beings.¹⁶ For instance, in her keynote address at NOW’s National Conference in 1974, then president, Wilma Scott Heide, stressed that especially for “women and/or men who are homemakers . . . the world is our home though some may choose to believe the home is their world.”¹⁷ Scott Heide was not undermining homemakers but pushing for a vision that conceived the home as an integral part of the outer world. In that same address, she criticized societal hypocrisy, ridiculing mainstream objections to public welfare by

¹⁴ See SWINTH, *supra* note 10, for a synthetic history of feminist efforts throughout this period.

¹⁵ For instance, in May of 1969, Women’s Liberation Conference activists reprinted “Women—The Struggle For Freedom.” See New England Female Liberation Conference, *Women—The Struggle For Freedom*, WINI BREINES PAPERS, May 1969, (on file with Schlesinger Library, Unclassified folder (7), 89-M17, Carton 2). The article listed women’s oppression in everyday life including unequal pay, low unionization, education discrimination, home responsibilities, sexual taboos and gendered expectations among others. *Id.* “But these are only little things. Revolutions are made of little things” and revolution would be brought about by women’s pursuit for freedom. *Id.* “Only women can define themselves” as “the oppressed have to discover their own dignity, their own freedom, they have to make themselves equal. They have to decolonize themselves. Then they can liberate the colonizers.” *Id.* (emphasis added). The piece was originally published on January 10, 1969, and reissued for the conference on a series of articles on Female Liberation selected by Boston-area women and published by New England Free Press. *Id.* Moreover, NOW’s first brochure—*An Invitation to Join*—urged women to join the organization stressing “the time has come to confront, with concrete action, the conditions that now prevent women from enjoying the equality of opportunity and freedom of choice which is their right, as individual Americans, and as human beings.” Nat’l Org. for Women, *An Invitation to Join* (1966) (on file with Schlesinger Library, MC 496, Carton 209, F.3); see Jennifer Einspahr, *Structural Domination and Structural Freedom: A Feminist Perspective*, 94 FEMINIST REV. 1 (2010). The Redstockings was a radical feminist collective that belonged to the “women’s liberation movement.” See ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA, 1967–1975* 140 (1989).

¹⁶ Similarly, I have opted for freedom instead of the more habitual “liberation” because I do not want to only speak about the women’s liberation movement but of a larger group of feminist efforts that sprang through the 1960s and 1970s. Additionally, the use of the term “freedom” has broader thematic implications in United States’ historiography. I want to give 1960s and 1970s feminists’ their rightful place in the long and convoluted history of (and for) American freedom.

¹⁷ Wilma Scott Heide, President, Nat’l Org. for Women, Keynote Address at NOW’s Seventh National Conference: You Can’t Stop NOW! (May 25, 1974) (on file with Schlesinger Library, MC 496, Box 31, F. 2).

observing that “[m]ost public welfare goes to already affluent men and/or those so oriented in behaviors and commitments via aid to dependent railroads, subsidies to oil companies, assistance to ailing business men [sic], etc.”¹⁸ Scott Heide’s remarks challenged the value society attributed to housework and care work. A few months later, she urged her audience at the Feminists’ State of the Union to “insist that no public body, commission or board have a majority of more than one of either sex and that child care experience be one valuable criterion for such leadership roles addressed to our future.”¹⁹ For Scott Heide, as for millions of women, *feminist freedom* required a new kind of world in which home, work, care, politics, and their relation underwent a radical transformation.

II. FEMINIST FREEDOM

Debates about women’s issues were incipient in the United States public agenda during the early 1960s, but at that point, widespread feminist activism was still dormant. In June 1963, Congress passed the Equal Pay Act, protecting workers from wage discrimination based on sex.²⁰ As President John F. Kennedy signed the bill into law, he said the legislation was much needed, as women’s labor force participation had drastically increased—1 in 3 workers was now a woman—and continued to rise faster than men’s.²¹ Furthermore, if in the president’s eyes the American economy depended “upon women in the labor force,” American mothers bore the heaviest burden. That load would later be known as the second shift, (i.e., women taking on paid work outside the home only to return to undiminished amounts of unpaid domestic work).²² Though President Kennedy’s remarks underscored a situation that was not new, especially for women who were poor, Black, or both, an unprecedented number of women found themselves in it.²³ Under these circumstances, the President noted, it was critical that

¹⁸ *Id.*

¹⁹ NAT’L ORG. FOR WOMEN, 8TH NATIONAL NOW CONFERENCE, IT’S OUR REVOLUTION NOW (Oct. 24-27, 1975) (on file with Schlesinger Library, MC 496, Box 21, F. 3). At that point, Wilma Scott Heide had finished her presidency and had been succeeded by Karen DeCrow. *Id.* Scott Heide remained a prominent NOWer and served as Chair of the National Advisory Board. *Id.* She delivered her speech as National Vice President of the Women’s Coalition for the Third Century, which she had co-founded the previous year. *Id.*

²⁰ Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1963).

²¹ President John F. Kennedy, Remarks Upon Signing the Equal Pay Act, THE AM. PRESIDENCY PROJECT (2019), <https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-equal-pay-act> [https://perma.cc/6DME-2UY8] (“Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force.”).

²² *Id.*; see generally ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

²³ See COBBLE, *supra* note 10, at 11–49.

“adequate provision be made . . . for the care of the children” while mothers were at work.²⁴ Accordingly, he continued, the Commission on the Status of Women he had previously appointed would study and report on daycare expansion and tax deductions.²⁵ The matter could have ended there, with the consideration of a report (or many) by the (disproportionately male) authorities, as it had on numerous other occasions. But something was changing, and in a few years, the uneasiness felt in “the Washington Underground Network” (as Betty Friedan called feminist officials) would resonate among millions of women.²⁶

The political environment of the early 1960s played a major role in feminist organizing. The effervescence of the Civil Rights Movement across the nation, and the presence of the New Left on college campuses, were central to the upsurge of feminist activism.²⁷ Primarily, the Civil Rights Movement and the New Left represented the possibility of thriving social movements, and, for many women, they provided the experience of organizing around a personal cause.²⁸ In the legislative arena, the 1964 Civil Rights Act secured for Black women many of the protections white women enjoyed. Further, the Act’s section on Equal Employment Opportunity, Title VII, incorporated sex among the prohibited grounds for discrimination (along with race, color, religion, and national origin), thus expanding the areas of employment discrimination against which women were protected.²⁹

²⁴ Kennedy, *supra* note 21.

²⁵ *Id.*

²⁶ Betty Friedan was the author of the acclaimed 1963 best-seller, *The Feminine Mystique*, and would become NOW’s first president. BETTY FRIEDAN, *LIFE SO FAR: A MEMOIR* 164–65 (2006); see BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1977). The “Washington Underground Network” referred to a group of feminist governmental officials that had been introduced to Friedan by Pauli Murray. Most of them would become NOW founders. As told by Friedan in her memoir, they were “Washington bureaucratic insiders, a small cadre of senior women working for the government. . . . I called this network of women . . . ‘my underground,’ which made them laugh. They thought I was romanticizing their small network with a revolutionary term like ‘underground,’ but they liked it.” BETTY FRIEDAN, *LIFE SO FAR: A MEMOIR* 164–65 (2006). See generally DANIEL HOROWITZ, *BETTY FRIEDAN AND THE MAKING OF THE FEMININE MYSTIQUE: THE AMERICAN LEFT, THE COLD WAR, AND MODERN FEMINISM* (1998), for a revision of Friedan’s life.

²⁷ See ECHOLS, *supra* note 15, at 3–50.

²⁸ See *id.* at 26; SARA EVANS, *PERSONAL POLITICS: THE ROOTS OF WOMEN’S LIBERATION IN THE CIVIL RIGHTS MOVEMENT & THE NEW LEFT* 19 (1980); Wini Breines, *A Review Essay: Personal Politics: The Roots of Women’s Liberation in the Civil Rights Movement*, 5 *FEMINIST STUD.* 496 (1979).

²⁹ See generally KATHERINE TURK, *EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE* (2016); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2008).

Important as they were, however, these legislative efforts continued to fall below the yardstick of expectations of the activists who had collaborated with the government. It was one thing to incorporate women in the process and quite another for the outcome to be responsive to their proposals. At the Third Annual Conference of State Commissions on the Status of Women of 1966, four years after the Commission's inaugural appointment, the time had come for a "NAACP for women."³⁰ Those who had become increasingly disenchanted with the government's limited commitment to the women's cause decided to form a new organization: the National Organization for Women (NOW).³¹

A. *National Organization for Women*

NOW vowed "[t]o take action to bring women into full participation in the mainstream of American society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men."³² However, bringing women to the mainstream was not just a matter of including them. It required a profound rethinking of societal structures for full participation and equal partnership to be substantial. The group pledged

³⁰ See generally FRIEDAN, *supra* note 26.

³¹ Not without pushback, the group of assistants that had gathered in Friedan's room on the second night of the conference (at the invitation of Betty Friedan and Pauli Murray) finally decided to join the crusade after the proposal they had drafted as an alternative to forming a new organization—that is, as a way to keep fighting from within—was rejected on the conference's luncheon. ROSALIND ROSENBERG, *JANE CROW: THE LIFE OF PAULI MURRAY 286–309* (2017). Pauli Murray had been reticent to the idea of forming a new organization because she did not want to compete with the existing ones. However, after her constitutional strategy "had stalled in Alabama, and no other test case emerged," and the Equal Employment Opportunity Commission rejected the council's suggestion to outlaw gender-segregated columns for "Help Wanted" ads in the newspapers, Murray had decided the time had come for a new organization. *Id.* at 297. The idea of a women's organization focused on women's rights advocacy had been rounding many of the conference's assistants for a while. *Id.* at 286–309. The women who were government staff, baptized by Friedan as the "Washington Underground Network," had been gathering and distributing information to women's organizations around the country but were hesitant about forming a group that would directly pressure the government given their institutional position. *Id.* Catherine East, the central figure among the government staff women, had convinced Friedan "that she was the best person to organize an independent women's group." *Id.* at 298. See KATHERINE TURK, *THE WOMEN OF NOW: HOW FEMINISTS BUILT AN ORGANIZATION THAT TRANSFORMED AMERICA* 11–31 (2023), for an account of NOW's formation.

³² Letter from Nat'l Org. for Women Temporary Steering Comm., *An Invitation to Join* (1966) (on file with Schlesinger Library, MC 496, Box 1, F. 2). In a 1971 press release, NOW called for the valorization of the occupation of homemakers, arguing: "the occupation of housewife, or househusband—house-spouse, if you will—must be regarded as the real job it is, with adequate recognition of its economic value and the worker's rights to vacation, retirement benefits, unemployment compensation and others forms of social insurance." Press Release, Nat'l Org. for Women, *An Invitation to Join* (1971) (on file with Schlesinger Library, MC 496, Carton 200, F. 8).

[a]id for all women, factory workers as well as executives, “to break through the silken curtain of prejudice and discrimination against women in government, industry, the professions, the churches, the political parties, the judiciary, the labor unions, in education, science, medicine, law, religion and every other field of importance in American society.”³³

The world envisioned by NOW focused on traditionally public spaces—areas imagined as primarily male—but also aspired to “an equitable sharing of the responsibilities of home and children and the economic burdens of their support.”³⁴ Though rhetorically NOW was committed to a far-reaching redistribution of social roles everywhere, given the founders’ backgrounds refiguring the public arena as a space amenable to both women and men appeared as the main priority.³⁵ Their aim was not merely to “include” women in those spaces but to re-invent them in a way that transcended gendered divisions of work. That was the logic undergirding Scott Heide’s recommendation that childcare experience be considered a valuable qualification for public office.³⁶ More often than not, however, concerns over economic deprivation (within the paid labor market) featured at the center of NOW’s early agenda.³⁷

A year after its formation, NOW drafted a Bill of Rights for women at its National Conference, which was finally ratified in 1968. Among the bill’s octet of rights, only one, the last one, referred to what has appeared as the

³³ Press Release, Nat’l Org. for Women, *An Invitation to Join* (1966) (on file with Schlesinger Library, MC 496, Carton 200, F. 2). This is from NOW’s first Press Release, written after the October 29, 1966 meeting where Betty Friedan was elected President and Cathryn Klarenbach was elected chair of the Board of the new founded organization. *See id.*

³⁴ *Id.*

³⁵ *See* COBBLE, *supra* note 10. In that sense, NOW was definitely in part the heir of labor feminists’ legacy both because of its ideological commitments and because many of its founders had participated in what Dorothy Sue Cobble has referred to as “the other women’s movement.” *Id.* Among these were Addie Wyatt, Caroline Davis, Lillian Hatcher and Dorothy Haener. *Id.*

³⁶ *See* Heide, *supra* note 17.

³⁷ To be sure, these efforts nominally included homemakers’ concerns and economic deprivation, even among middle and upper-class women who did not have direct access or influence over the familial budget. *See* Press Release, Nat’l Org. for Women, *Demands to be Presented to President Nixon in Meeting With Patricia Hitt, Assistant Secretary of Health, Education and Welfare* (1969) (on file with Schlesinger Library, MC 496, Carton 200, F. 1); Press Release, Nat’l Org. for Women (Jan. 6, 1967) (on file with Schlesinger Library, MC 496, Carton 200, F. 3); Press Release, Nat’l Org. for Women (Feb. 15, 1968) (on file with Schlesinger Library, MC 496, Carton 200, F. 4).

leading issue since the 1990s: the right to control one's reproductive life.³⁸ The first right consisted of incorporating the Equal Rights Amendment (ERA) into the Constitution.³⁹ Indeed, the ERA passage became an organizational priority during its first decade. The second was to promote enforcement of laws banning sex discrimination in employment, which was also high on NOWers' list of priorities.⁴⁰ Many of the founders were

³⁸ See Nat'l Org. for Women, NOW Bill of Rights (1967) (on file with Schlesinger Library, MC 496, Box 1, F. 2). According to the organization's current recount of its history, it was the first national organization to endorse the legalization of abortion with its inclusion in their Bill of Rights. See *Highlights* (2014), <https://now.org/about/history/highlights> [https://perma.cc/ZFE7-HM66].

³⁹ Nat'l Org. for Women, NOW Bill of Rights, *supra* note 38. This was several years before Representative Martha Griffiths reintroduced the amendment in 1970 to finally be passed by the House and Senate in 1971. See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755 (2004), for a history of how feminist factions—previously at odds—coalesced around the 1970s ERA dual strategy.

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NOW BILL OF RIGHTS: I. Equal Rights Constitutional Amendment/ II. Enforce Law Banning Sex Discrimination in Employment/ III. Maternity Leave Rights in Employment and in Social Security Benefits/ IV. Tax Deduction for Home and Child Care Expenses for Working Parents/ V. Child Day Care Centers/ VI. Equal and Unsegregated Education/ VII. Equal Job Training Opportunities and Allowances for Women in Poverty/ VIII. The Right of Women to Control their Reproductive Lives/ We Demand: I. That the United States Congress immediately pass the Equal Rights Amendment to the Constitution to provide that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" and that such then be immediately ratified by the several States. II. That equal employment opportunity be guaranteed to all women, as well as men by insisting that the Equal Employment Opportunity Commission enforce the prohibitions against sex discrimination in employment under Title VII of the Civil Rights Act of 1964 with the same vigor as it enforces the prohibitions against racial discrimination. III. That women be protected by law to insure their rights to return to their jobs within a reasonable time after childbirth without loss of seniority or other accrued benefits and be paid maternity leave as a form of social security and/or employee benefit. IV. Immediate revision of tax laws to permit the deduction of home and child care expenses for working parents./ V. That child care facilities be established by law on the same basis as parks, libraries and public schools adequate to the needs of children, from the pre-school years through adolescence, as a community resource to be used by all citizens from all income levels. VI. That the right of women to be educated to their full potential equally with men be secured by Federal and State legislation, eliminating all discrimination and segregation by sex, written and unwritten, at all levels of education including college, graduate and professional schools, loans and fellowships and Federal and State training programs, such as the job Corps. VII. The right of women in poverty to secure job training, housing and family allowances on equal terms with men, but without prejudice to a parent's right to remain at home to care for his or her children; revision of welfare legislation and

particularly invested in employment regulation. After all, most had come from that world.⁴¹ The five rights that followed related to social problems around childcare and other material needs.⁴² These included maternity leave and social security benefits, tax deductions for childcare expenses, daycare centers, and “Equal and Unsegregated Education.”⁴³ The seventh called for “Equal Job Training Opportunities and Allowances for Women in Poverty.”⁴⁴

While some measures like tax deductions were aimed at (white) middle-class professionals, others incorporated preoccupations directed at working-class women, namely, allowances for women in poverty and job training “without prejudice to a parent’s right to remain at home to care for his or her children.”⁴⁵ This was meant to both provide women with opportunities in the waged-labor market while still recognizing that it was not the only, nor necessarily the best, option.⁴⁶ The disclaimer about a parent’s (as opposed to a mother’s) right to stay at home with their kids reflected a genuine, even if partial, commitment to the deconstruction of gendered care roles, which

poverty programs which deny women dignity, privacy and self-respect.
VIII. The right of women to control their own reproductive lives by
removing from penal codes the laws limiting access to contraceptive
information and devices and laws governing abortion.

Nat’l Org. for Women, NOW Bill of Rights, *supra* note 38; see TURK, THE WOMEN OF NOW: HOW FEMINISTS BUILT AN ORGANIZATION THAT TRANSFORMED AMERICA, *supra* note 31, at 79–81.

⁴¹ Betty Freidan was elected President and Dr. Kathryn Clarenbach, Director of Continuing Education at the University of Wisconsin and Chairman of the Wisconsin’s Governor Commission on the Status of Women, chairman of the board. Press Release, Nat’l Org. for Women, A New Organization for American Women (1966) (on file with Schlesinger Library, MC 496, Carton 200, F.2). Aileen Hernandez, who had formerly been a Senior Commissioner of the Equal Employment Opportunity was named executive Vice-President and, Richard Graham, who had worked alongside Hernandez as a Commissioner and had been the founding director of the National Teachers Corp was named Vice-President. *Id.* Caroline Davis, who had served at the presidential commission on the status of women was the Director of the Women’s Department of the United Auto Workers, AFL-CIO was named Secretary-Treasurer. *Id.*

⁴² See Nat’l Org. for Women, NOW Bill of Rights, *supra* note 38.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ For example, the Sixth Annual Conference of the NOW Souvenir Journal promoted the Quarterly Newsletter “Working Mothers” whose heading read: “All Mothers Are Working Mothers” thereby inextricably linking women’s work outside and inside the home. NAT’L ORG. FOR WOMEN, SIXTH ANNUAL CONFERENCE BOOKLET (1973) (on file with Schlesinger Library, MC 496, Box 21, F.1).

manifested in the organization's many initiatives.⁴⁷ NOW would not need to wait long for their contention to resonate into the legal mainstream. In the famous *Weinberger vs. Wiesenfeld*, the Supreme Court held it unconstitutional for a social security survivorship benefit to care for children to apply to widows but not widowers.⁴⁸

⁴⁷ For instance, NOW's task force on the Masculine Mystique strove to denaturalize gender roles by fostering a nurturing fatherhood and challenging successful-male-breadwinner ideals. See KIRSTEN SWINTH, FEMINISM'S FORGOTTEN FIGHT: THE UNFINISHED STRUGGLE FOR WORK AND FAMILY 42–69 (2018). Although, by 1967, cultural assumptions about gender roles were being questioned, the challenges concentrated mostly on society's limited vision of women's possibilities through an expansion in the perception of women's desire for more professional, sexual, and political opportunities. See *id.* In the media for example, the ideal of women as beings incapable of sexual pleasure outside of marriage, or who's sexuality was set for expiration in her early thirties was deeply defied by the film version of the 1963 novel *The Graduate* which debuted as a motion picture in 1967. See Alec Scott, *When 'The Graduate' Opened 50 Years Ago, It Changed Hollywood (and America) Forever*, SMITHSONIAN MAG. (2017), <https://www.smithsonianmag.com/arts-culture/graduate-opened-50-years-ago-changed-hollywood-forever-180967222> [https://perma.cc/6NGD-44XY]. The instant-classic was awarded five Golden Globes and one Academy Award, in addition to the positive reception it had from critics, it also had tremendous economic success as it was the third highest grossing film at the time. *Id.* Ironically though, the actress who portrayed middle-aged Mrs. Robinson in the film was 35 years old when she was filming, while her co-protagonist who was supposed to be a 21-year-old was impersonated by an actor who was 29 at the time. *Id.* In fact, a decade later the issue of gender roles and homemaking would become momentous as NOW strived to incorporate the Equal Rights Amendment to the Constitution and intended not to alienate housewives who felt their lifestyle was being threatened by the ERA. See ZIEGLER, *supra* note 7, at 134–38.

⁴⁸ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637 (1975). The 1975 case was presented by Ruth Bader Ginsburg, then ACLU's lawyer and director of the Women's Rights Project. See *generally id.* She represented a widower who was denied Social Security benefits that would have accrued to him if he were a widow, instead of a widower father taking care of his child. *Id.* The Supreme Court decided by a slashing 8 to 0 majority, that the statute in question violated the Due Process Clause by treating similarly situated men and women dissimilarly without there being an explanation on the legislation trying to "provide for the special problems of women." *Id.* at 653. Although the opinion was unanimous (as Justice Douglas did not take part in the consideration or the decision of the case), the judges differed in the extent of the requirements a gender classification needed to comply with to be constitutional and wrote three opinions. See *generally id.* Justice Brennan delivered the opinion of the court, Justice Powell joined by Chief Justice Warren wrote a concurrence, and Justice Rehnquist another. See *generally id.* The decision came after the 1974 case *Kahn v. Shevin*, also presented by Ruth Bader Ginsburg, in which the Court rejected the plaintiff's appeal against the Florida statute that granted widows a \$500 property tax exemption but denied said exemption to widowers. *Kahn v. Shevin*, 416 U.S. 351, 352 (1974). The majority reasoned that since women's chances of succeeding in the job market were notoriously lower than that of men's, "[w]hether from overt discrimination or from the socialization process of a male-dominated culture," the Florida statute's differential treatment was not unconstitutional. *Id.* at 353. The 6-3 majority stressed it rested upon a "ground of difference having a fair and substantial relation to the object of the legislation." *Id.* at 355 (citing *Reed v. Reed*, 404 U.S. 71, 76 (1971)). In the words of the majority, Florida's tax law was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden" for which it was "not in conflict with the Federal Constitution." *Id.* at 355.

Economic concerns were at the center of NOW's agenda during its early years. To the organization's eyes, the "working woman" appeared as a leading bank consultant, an "unskilled" laborer, and a woman in poverty.⁴⁹ She materialized as a figure that broke into traditionally male spaces on the one hand and as a champion for the betterment of conditions in historically female occupations on the other.⁵⁰ The organization campaigned to bring women to all areas of power while recognizing the social significance of traditionally female roles, particularly care labor—both underpaid and unpaid.⁵¹ In the same vein, NOWers explicitly adopted women's poverty as a concern and took action. For instance, they collaborated in 1968 with the poor people's campaign, writing checks and fasting to support the cause.⁵² Although leaders and NOW's publications sometimes referred to welfare recipients and homemakers, their actions and policies mainly focused on the waged working woman. Lobbying, litigation, and community outreach efforts were primarily devoted to employment issues.⁵³

However, for NOW, not all that glittered was employment. Care arrangements, too, were up for grabs, and NOW seized the invitation with enthusiasm. The organization did not merely conceive of childcare—like President Kennedy had—as a response to women's material need under current conditions. Instead, NOW articulated the demand as a public matter, casting it through a particular remedy: a large-scale public service. The question was not only about women's material needs or entitlements, which could be addressed in different ways, but also about social meanings. The Bill of Rights proposed that "child care facilities be established by law on the same basis as parks, libraries and public schools, adequate to the needs of

⁴⁹ See, e.g., Aleta Styers, Board Member, Nat'l Org. For Women, Speech at Michigan Avenue's Allerton Hotel: Sex Stereotypes in Business (1970) (on file with Northwestern University, Aleta Styers, F.5). Aleta Styers, a National NOW Board Member who had been president of NOW's Chicago chapter, led a discussion on women in business on March 19, 1970 at the Cloud Room of Michigan Avenue's Allerton Hotel. *Id.* Participants were served cocktails at 11:30 then participated in the discussion led by Styers at the luncheon at noon. *Id.*

⁵⁰ See, e.g., Letter from Eastern Mass., addressed to Muriel Fox, et al. (Jan. 24, 1973) (on file with Schlesinger Library, MC 496, Carton 42, F.10) (describing how Nurses NOW was one of the earliest and most active task forces). Wilma Scott Heide, who had come from the profession, served as NOW's president between 1971 and 1974. See *id.*

⁵¹ See Nat'l Org. for Women, NOW Bill of Rights, *supra* note 38.

⁵² Press Release, Nat'l Org. for Women, Women's Rights Group Urges May 18th Fast to Free Women From Poverty (on file with Schlesinger Library, MC 496, Carton 200, F.4).

⁵³ See generally NAT'L ORG. FOR WOMEN, SIXTH ANNUAL MEETING REPORT, TASK FORCE SUMMARIES (1973) (on file with Smith College, Aileen C. Hernandez Papers, Box 81); *ERA Passed by Congress "Failure was Impossible"*, NOW ACTS (on file with Smith College, Aileen C. Hernandez Papers, Box 83).

children from the pre-school years through adolescence, as a community resource to be used by all citizens from all income levels.”⁵⁴ NOWers conceived of child care both as the response to a material need *and* as a civic aspiration, an imagined public space positioned precisely alongside the most paradigmatic public spaces.⁵⁵ That is, NOW’s investment in childcare was as much an investment in public goods, public spaces, and citizenship. High-quality childcare ought to be nationally available as “all socio-economic groups are fully and equally entitled to this service.”⁵⁶ Even beyond the Bill of Rights, the organization considered daycare a crucial issue. NOW’s childcare agenda on the ground combined grand policy projects with small-scale local initiatives. For NOW, it was paramount to empower chapters to take matters into their own hands and foster community bonds in responding to local daycare needs.⁵⁷ At stake was not just the provision of childcare, but the kind of service that would be offered. NOW’s aspired transformation was to be cast through new institutions and practices articulated through the law in the form of public services and cooperative institutions.

During its early years, NOW often referred to itself as a women’s civil rights organization.⁵⁸ For many of its leaders, the women’s movement was the natural successor to the Black civil rights movement. Tellingly, a 1969 NOW newsletter for members recounted the launch of its campaign against

⁵⁴ Nat’l Org. for Women, NOW Bill of Rights, *supra* note 38.

⁵⁵ Following Arendt, I use “public” in this context as the “public realm, as the common world, gathers us together and yet prevents our falling over each other,” a place of physical encounter as well as one of common construction, a shared world. See HANNAH ARENDT ET. AL., *THE HUMAN CONDITION* 52–53 (2018).

⁵⁶ Memorandum from Florence F. Dickler, National Coordinator of Child Day Care, to all chapters of Nat’l Org. for Women. (on file with Northwestern University, Aleta Styers Papers, F.8.4). NOW’s commitment to childcare was expressed in the establishment of a National Child Care Coordinator within the organization. See *id.* Efforts to actually push forward day care initiatives, though, proved more difficult than what NOW’s leadership had initially expected. Even within the organization, enthusiasm was spotty, presumably due to the lack of members with small children. More generally, childcare was an important concern for the movement. See SWINTH, *supra* note 10.

⁵⁷ In addition to advocating for national efforts, the organization encouraged its local chapters to form their own childcare committees. Speech on Day Care (on file with Northwestern University, Aleta Styers Papers, F.1.). Local committees were expected to be familiarized with childcare legislation, build bridges with other activists, public figures, trade unions and industries, press for greater tax benefits, publicly advocate for the expansion of better, more widely available daycare services, as well as studying how to form a childcare facility and what were their community’s daycare needs. Memorandum from Florence F. Dickler, National Coordinator of Child Day Care, to all chapters of NOW (on file with Northwestern University, Aleta Styers Papers, F.8.4).

⁵⁸ See, e.g., Statement of National Organization for Women—July 9, 1973 (on file with Smith College, Aileen C. Hernandez Papers, Box 81); see also Nat’l Org. for Women, An Invitation to Join (on file with Schlesinger Library, MC 496, Box 209, F.3) (“[A] new civil rights organization pledged to work actively to bring women into full participation in the mainstream of American society NOW.”).

sex-segregated spaces by insinuating it was the continuation of the Black fight for freedom.⁵⁹ The publication unironically noted, “[i]t was the birthday of Abraham Lincoln, the Great Emancipator, the day NOW was to launch its nationwide Public Accommodations week to protest sex discrimination in restaurants, bars and public carriers” as it featured a picture of four women in fur winter coats picketing the Oak Room of the Plaza Hotel.⁶⁰

Symbolically, positioning their fight alongside emancipation and civil rights made sense for NOW’s larger vision of a feminist quest for freedom. Strategically, as racial segregation of social spaces had become unacceptable, the link could harness sympathy for the action.⁶¹ Besides, many conflicts that preceded the rise of the anti-segregation civil rights doctrine loomed in feminist discussions.⁶² The centrality of economic concerns, and their relation to the broader redefinition of the social sphere, was a site of intense debate within feminist circles. NOWers decided to launch their campaign at the emblematic Plaza, signaling that women were ready to enter all spaces where decisions were made while hinting that the class inequalities they underscored would remain unchanged. Instead of defying the elitist logic of the Plaza, NOWers opted for an assimilation strategy by picketing in elegant coats.⁶³ Of course, no one action expressed the terms of the revolution NOW envisioned, but the emphases they made along the way reflected the

⁵⁹ The 1969 National Conference had voted to “stage demonstrations against ‘Men Only’ restaurants, bars, clubs, and other sex-segregated public accommodations” in a “Public Accommodations Week” of protests. Press Release, Nat’l Org. for Women, NOW Tests “Man Only” Policy At Oak Room of The Plaza (Oct. 12, 1969) (on file with Schlesinger Library, MC 496, Carton 200, F.5).

⁶⁰ *We Will Not Be Banned!*, NOW ACTS, Winter/Spring 1969, at 7 (on file with Schlesinger Library, MC 499, Box 3, F.1).

In the article, the picture’s footer read: “Plaza’s Oak Room bars women, and that’s what the picketing 269sa ll about.” *Id.* In the image, five protesters could be distinguished, four women in coats and one man in suit. *See id.* The article explained protesters were instructed to “wear a fur coat” so as to avoid potential dress code objections on the part of the Plaza. *Id.* It celebrated the press’ lively concurrence to the action notwithstanding the bad weather that “the 30 NOW demonstrators, including two brave male members—Dr. Shepard G. Aronson and Stephen Stalonus—were outnumbered almost two-to-one by reporters, photographers and camera crews.” *Id.*

⁶¹ *Id.* at 8. The newsletter evaluated the press coverage positively, hypothesizing it was sympathetic “perhaps because the press saw the similarity between NOW’s sit-in and the sit-ins held in the South early in the days of the black movement.” *Id.*

⁶² See generally RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2010), for an account of how economically imbued visions of civil rights were displaced by the ultimate victor, anti-segregation doctrine and the underlying stakes of the discussion.

⁶³ *See We Will Not Be Banned!*, *supra* note 58 (instructing protesters “to wear a fur coat, even if they had to borrow one”).

contested contours of their vision. The fur coat picketing did receive pushback from some members. As one “somewhat bitterly” remarked: “[t]his ‘frivolous’ issue gave NOW more publicity than most of the serious issues we’re fighting for.”⁶⁴ In any case, if mediated by class, NOWers strove to open spaces for women in every area they could think of. Though differentially articulated, civil rights and citizenship notions were essential for their plan.

In those years, more and more women began to organize from coast to coast around issues of their everyday lives. The capacious pursuit of *feminist freedom* manifested in numerous sites: homes, parks, families, bookstores, welfare offices, streets, legislatures, courts, doctor’s offices, and daycares, to name a few.⁶⁵ Because everyday life was so different for women depending on their age, class, race, ethnicity, and geographical context, organizing around quotidian issues took diverse forms as well: whether through collectives, local cooperatives, informal mutual-aid associations, college campus groups, or elegant fundraising dinners, women all over were taking matters into their own hands.⁶⁶

As the feminist cause sprawled, NOW appeared as the natural candidate to lead the fight. Or at least it seemed so to then-president Betty Friedan. In 1969, Friedan “jubilantly” informed all members that under the favorable “new nationwide consciousness of the oppression of women,” NOW canceled its regular September board meeting to organize regional conferences instead; Friedan explained that the purpose was “to try and form a political power bloc of all women burgeoning women’s liberation groups and new feminist caucuses in all fields of American life.”⁶⁷ Activists would coalesce into a unified power bloc through which NOW could spearhead the fight.

⁶⁴ *Id.*

⁶⁵ See ECHOLS, *supra* note 15, for an overview of radical feminists (who characteristically met in living rooms, bookstores, streets and even communes). See DAPHNE SPAIN, *CONSTRUCTIVE FEMINISM: WOMEN'S SPACES AND WOMEN'S RIGHTS IN THE AMERICAN CITY* (2016), for an overview of the feminist landscape and spaces specially dedicated to feminist activism (art galleries, health clinics, domestic violence shelters, etc.). See generally FELICIA KORNBLUH, *THE BATTLE FOR WELFARE WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007) and ANNELISE ORLECK, *STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY* (2006), for a history of the welfare movement and their uses of the streets, courts and welfare offices. See generally HANNAH DUDLEY-SHOTWELL, *REVOLUTIONIZING WOMEN'S HEALTHCARE: THE FEMINIST SELF-HELP MOVEMENT IN AMERICA* (2020) and SANDRA MORGEN, *INTO OUR OWN HANDS: THE WOMEN'S HEALTH MOVEMENT IN THE UNITED STATES, 1969-1990* (2002), for a specific account of healthcare centers and spaces.

⁶⁶ See *supra* note 65.

⁶⁷ Memorandum from Betty Friedan, President of the Nat'l Org. for Women, to all members of NOW (1969) (on file with Schlesinger Library, MC 499, Box 3, F.3).

As the nascent organization strived to become the authoritative representative of women's demands (to the outside), some of its leaders pressed for a more representative composition on the inside. Many within NOW were mindful of how race and class inflected different manifestations of the feminist struggle. A few months before Friedan's enthusiastic letter to the membership, board member Aileen C. Hernandez—who would succeed Friedan in the presidency—had urged the board to increase their efforts to “[get] members from minority groups and from trade union women” noting that “[w]ith the exception of our strong UAW members, I don't think we have gained wide support in non-professional circles.”⁶⁸ Unlike Friedan, Hernandez had been part of the “Underground Network.” She was an African American union organizer, a civil rights activist, and had been an EEOC commissioner until her resignation in 1966 in protest of the Commission's non-enforcement of Title VII.⁶⁹ The contrasting visions and trajectories of NOW's first presidents reflected a tension that troubled the organization through the following decades.

Feminists' wide-ranging efforts were mutually imbricated in the struggle for freedom. Although work areas were important on their own, collectively, they represented the possibility of a new order. Potential members were introduced to the organization through its work, which was meant to tackle the oppressive structures women were subjected to in virtually every aspect of life: economic, educational, social, political, cultural, and religious. For instance, in 1967 and 1968, NOW's invitation to new members publicized its seven task forces (Equal Employment Opportunity, Women in Poverty, Sex Discrimination in Education, Marriage and the Family, The Image of Women, Women in Religion, and Political Rights and Responsibilities).⁷⁰

⁶⁸ Letter from Aileen C. Hernandez, Nat'l Org. for Women President, to NOW National Board (Dec. 1, 1968) (on file with Smith College, Aileen C. Hernandez Papers, Box 74). She had also expressed similar concerns in 1967 in a private letter she sent to Muriel Fox. Letter from Aileen C. Hernandez, Vice President of the Nat'l Org. for Women, to Muriel Fox (Oct. 21, 1967) (on file with Smith College, Aileen C. Hernandez Papers, Box 74) (“I still think NOW needs to find ways of gaining more appeal in the minority communities.”).

⁶⁹ See generally TURK, *THE WOMEN OF NOW: HOW FEMINISTS BUILT AN ORGANIZATION THAT TRANSFORMED AMERICA*, *supra* note 31. *Id.* Hernandez had been born in Brooklyn to Jamaican parents. *Id.* Aileen Clark spent her first years in New York, where she would come of age. *Id.* She spent her childhood first in Harlem and then Brooklyn, until she moved to Howard University for College before becoming an organizer. *Id.*

⁷⁰ NAT'L ORG. FOR WOMEN, AN INVITATION TO JOIN 6 (1967) (on file with Schlesinger Library, MC 496, Box 1, F.2); NAT'L ORG. FOR WOMEN, AN INVITATION TO JOIN 12 (1968) (on file with Schlesinger Library, MC 496, Box 1, F.2). Earlier drafts from November 1966 tentatively suggested: “Employment, Education, Social Invitations, Image of Women, Political Rights and Responsibilities, Poverty.” Agenda, NOW Board Meeting (Nov. 20, 1966) (on file with Schlesinger Library, MC 575, Box 126, F.1544).

Note how there was no independent task force for reproductive rights at that point. The first would not appear until 1970.⁷¹

However, creating a task force on reproduction did not mean it became central. In contrast, in 1970 NOW's priorities were political power, the ERA, and mounting "a national campaign for universal child care."⁷² The emphasis at that point was on social and economic structural inequalities that prevented women's full participation in American society. Abortion was but a part of this larger canvas. Tellingly, a pamphlet of the 1970 massive Women's Strike for Equality NOW organized demanded: "the right to [free] [a]bortion on [d]emand, no forced sterilization, [free] 24 [h]our [sic] childcare [c]enters—[c]ommunity [c]ontrolled, [equal] [o]pportunities in [j]obs and [e]ducation."⁷³ When abortion appeared it was part of a larger attack on the structural conditions that curtailed women's freedom.

As President Hernandez wrote the following year, "[i]f the American woman wants to change her environment, the time is now and the voice must be her voice, defining her own issues and solutions. The goal of the new feminists is a restructuring of the society—to provide shared power and a shared responsibility."⁷⁴ Indeed, by seizing power to define their issues and solutions, NOW confronted the social and economic structures that oppressed women. Even if the organization did not live up to its promises, as Hernandez feared, NOW was committed to confronting women's

⁷¹ See *Abortion Repeal: N.O.W. Makes it Respectable!*, NOW ACTS, Winter/Spring 1969, at 15 (on file with Schlesinger Library, MC 499, Box 3, F.1) (reporting on all the organization's actions on abortion Alexander notes that "[v]arious NOW chapters have been working consistently to promote abortion repeal in their states"); see also Memorandum from Nat'l Org. for Women (1970-1980) (on file with Schlesinger Library, MC 496, Carton 42, F. 13) (comparing a collection of Nat'l Comm. Coordinators directory lists from a span of years in which the reproduction-related committee appears and its naming convention evolves).

⁷² See Press Release, Nat'l Org. for Women, NOW Focuses on Political Power, Day Care and the Equal Rights Amendment (Mar. 23, 1970) (on file with Schlesinger Library, MC 499, Box 3, F. 2); see also Letter from Betty Friedan, Pres. of NOW, to Org. Members (1969) (on file with Schlesinger Library, MC 499, Box 3, F. 3) (recognizing priority for child care centers).

⁷³ Judy Klemesrud, *Coming Wednesday*, N.Y. TIMES (Aug. 23, 1970), <https://www.nytimes.com/1970/08/23/archives/coming-wednesday-a-herstory-making-event-demonstrations-and-parades.html> [<https://perma.cc/FY6L-RZZ2>]; see also Pamphlet, Nat'l Org. for Women, Women's Strike Demonstration (1970) (on file with Schlesinger Library, MC 499, Box 10, F.17) (illustrating that the demand against forced sterilization was added to the pamphlet later because this newspaper article did not include forced sterilization, suggesting the added preoccupation came from rank-and-file activists more attuned to the needs of women of color); TURK, THE WOMEN OF NOW: HOW FEMINISTS BUILT AN ORGANIZATION THAT TRANSFORMED AMERICA, *supra* note 31, at 104–08 (illustrating the story behind the organization of the 1970 demonstration); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1988, 1988–93 (2003) (discussing a synthetic and powerful depiction of the stakes of the strike).

⁷⁴ Aileen C. Hernandez, *The Preening of America*, STAR-NEWS PASADENA, CAL., New Year's Edition 1971, at D-4 (on file with Smith College, Box 86).

oppression across the economic and racial spectrum from its early years. It did so by setting its eye on numerous structures.

NOW considered itself the leader of the revolution whose time had come and fought to live up to the task. But if revolutionary, their fight was not new. Activists saw themselves as part of a longer genealogy. The organization narrated its founding as the resurrection of suffragettes' unfinished fight for freedom. To them, NOW's existence constituted a point of inflection in the long feminist struggle: "[t]he National Organization for Women was a reality; the new feminists were on the march—determined to finish the fight for freedom which had ground to a halt with the passage of the Suffrage Amendment in 1920."⁷⁵ Interestingly, in their recollection, the ratification of the Nineteenth Amendment marked both a moment of triumph and defeat.⁷⁶ However momentous, the amendment had marked the cessation (even if temporary) of the fight for freedom.

B. National Welfare Rights Organization

As NOW founders pledged to form an organization on June 30, 1966, the streets of Washington and other cities witnessed a different group's more visible launch. Six thousand activists (primarily women) grappling with questions not that different from the ones NOW founders were confronting demonstrated across the country.⁷⁷ That day, welfare recipients protested in state capitols, roads, public squares, and welfare offices, greeting onlookers with the first national demonstration of Aid to Families with Dependent Children recipients.⁷⁸ These actions were part of a coordinated effort to launch a nationwide welfare rights campaign that would later be known as the National Welfare Rights Organization (NWRO). Although local groups had been agitating and organizing around welfare for some time, the

⁷⁵ NAT'L ORG. FOR WOMEN, *THE FIRST FIVE YEARS 1966–1971* 3 (1971) (on file with Schlesinger Library, MC 496, Box 1, F.1) (recounting the organization's origin and evolution in its first five years).

⁷⁶ This genealogy loomed large on NOW's imaginary. The Women's Strike for Equality of 1970 commemorated 50 years from the passage of the Nineteenth Amendment. See Judy Klemesrud, *Coming Wednesday*, N.Y. TIMES (Aug. 23, 1970), and TURK *supra* note 73.

⁷⁷ See KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016), for a history of the United States welfare rights rise during the twentieth century, and its embedment in power and significance for American governance.

⁷⁸ For example, Boston protesters, one newspaper reported, "made their point by storming the state house to force state officials to listen to complaints about the welfare system." 24 *Women in Welfare March in Boston Force Volpe, Brooke to Hear Complaints*, NORTH ADAMS TRANSCRIPT, Jul. 1, 1966, at 39; see also Reed Smith, *Welfare March, Rallies Point Up Dissatisfaction*, STEUBENVILLE HERALD STAR, Jun. 30, 1966, at 17; Welfare March Culminated, GARDEN CITY TELEGRAM, Jun. 30, 1966, at 9.

inaugural demonstration signaled the beginning of the national campaign “involving more than one hundred local [welfare rights] groups.”⁷⁹

While the welfare rights movement was not explicitly feminist from its origin, most of its constituency consisted of African American women.⁸⁰ Female welfare recipients, such as New York’s Beulah Sanders⁸¹ and Jennette Washington,⁸² held significant leadership positions.⁸³ As historian Premila Nadasen has argued, the “movement [] represented a struggle by women for their autonomy and, therefore, can and should be defined as part of the women’s movement of the 1960s.”⁸⁴ Materially a women’s movement devoted to poor—overwhelmingly Black—women’s issues, the welfare rights campaigns defied the expectations and control society exerted over Black women.⁸⁵

⁷⁹ KORNBLUH, *supra* note 65, at 16.

⁸⁰ While roughly half of the welfare rolls in the mid-1960s were lined by African Americans, the welfare rights movement was primarily integrated by African Americans, “perhaps 85 percent, with some participation by white, Latina, and Native American women.” NADASEN, *supra* note 12, at 28.

⁸¹ By 1966, unable to secure employment Sanders lived with a small welfare check in a neighborhood subject to the urban renewal program (known as the “Negro removal” program by some black activists) where her activism began. *Id.* The program was intended to “renew” urban spaces by eradicating “slum” housing, removing poor people from the neighborhoods they lived in “to make way for better housing and wealthier families.” NADASEN, *supra* note 12, at 25. Sanders advocated for poor people’s rights to remain in their homes, pushing to reform the urban renewal program and end the demolition of their homes. *Id.* Many of the neighbors that were subject to the urban renewal program were also welfare recipients.

⁸² Washington moved to New York as a child with her mother who had left Florida to find a job. *Id.* Washington worked in a factory until she was laid off during a recession, she then turned to welfare to help support her three children. *Id.* at 214.

⁸³ Washington attended the convention where the national coordination was officially launched and was a member of the executive board of the New York Citywide Coordinating Committee roughly from 1968 to 1971. *Id.* at 24–25. She then participated in the national leadership until 1973, when she was removed from her position by Faith Evans who accused her and other members of falling into factionalism. *Id.* Washington then presented her resignation from the NWRO and announced she would direct her energies to the National Unemployed and Welfare Rights Organization instead. *Id.* Sanders on the other hand was the national chair of the NWRO from 1970 to 1974. *Id.* She was also the organization’s first vice-president. NADASEN, *supra* note 12, at 24–25. She left her position as chair when delegates voted to replace her with Frankie Jeter as a way to distance the movement from its intense lobbying activity in favor of other strategies. *Id.* Sanders had moved to New York from her hometown Durham, NC, along with her twin boys to find a job a decade earlier. *Id.*

⁸⁴ NADASEN, *supra* note 12.

⁸⁵ An important fight was against the “man in the house laws” by which administrative authorities denied welfare recipients of their benefits if they were found to have sexual or affective relations with a man who was then deemed the rightful provider. See Alison Lefkowitz, *Men in the House: Race, Welfare, and the Regulation of Men’s Sexuality in the United States, 1961–1972*, 20 J. HIST. SEXUALITY 594, 598 (2011).

Agitating around welfare was a way to demand social recognition of Black women's work as mothers. In fact, several local welfare organizations included the word "mother" in their name and "portrayed themselves as mothers['] groups."⁸⁶ As an abstract model, the (white) stay-at-home mother (with a breadwinner husband) was not just an economic ideal but a moral imperative that welfare feminists countered with a competing vision. The NWRO deployed laws and welfare policies to rearrange the social picture in which Black welfare mothers featured.⁸⁷

In struggling for the expansion of welfare benefits, activists strove to gain economic and social freedom. The first step in that road was securing the benefits they were legally entitled to but had been denied due to administrative loopholes. A representative example was the minimum standards campaign.⁸⁸ The operation came about when the NWRO gained access to the welfare department's lists of goods available for recipients, information that until that moment had been carefully and deliberately kept from them.⁸⁹ With the help of some dissident caseworkers, welfare activists had access to comprehensive data about "the array of goods the welfare department—in manuals it did not share with its clients—claimed were necessary for families to live at a minimum standard of health and decency."⁹⁰ Thus, by circulating what the minimum standards lists comprised and coordinating recipients to demand them, the NWRO got hundreds of dollars' worth of winter clothing and numerous new members for the organization.⁹¹ The provision of what children needed under the minimum standard of well-being set by the administration was, thus, enabled by the militant efforts of mothers claiming their autonomy and worth as heads of households. NWRO's creative deployment of administrative standards turned recipients' relationship with the state upside down, from nuisances in the eyes of the state bureaucracy to citizens in their own right.

Like NOW, the NWRO contested the gendered valuation of different forms of productivity and desert. As activists nearly collapsed the system by reclaiming the legal benefits they were entitled to, their pressure exposed the cynicism that underlay welfare benefits' residual character. As NOW's salient president noted in 1974, "aid to dependent railroads" did not awaken the

⁸⁶ NADASEN, *supra* note 12, at 31.

⁸⁷ See KORNBLUH, *supra* note 65; NADASEN, *supra* note 12.

⁸⁸ KORNBLUH, *supra* note 65, at 44–48.

⁸⁹ *Id.*

⁹⁰ *Id.* at 45.

⁹¹ *Id.* at 47–48.

social reproach welfare reclaimed by less affluent recipients did.⁹² Thus, as they demanded welfare, activists questioned the entire landscape of economic distribution and the state's decisive role in it.

C. *Wages for Housework*

During the final years of the NWRO, in the early 1970s, another group of feminists would grab the torch. With a more decidedly Marxist orientation, the Wages for Housework (WFH) campaign demanded government payments for women's labor as homemakers.⁹³ The campaign, like the NWRO, considered welfare the first salary the government paid for housework.⁹⁴ In Brooklyn, two collectives, New York Wages for Housework (NYWFH) and Black Women for Wages for Housework (BWWFH), agitated to demand from the government material recognition of housework's value.⁹⁵ These collectives questioned how society assigned a monetary value to productive and reproductive social labor. Cleaning, feeding, and childrearing were not natural callings but actual forms of work. This critique extended to, and called into question, every level of society. Its goal was to disrupt the existing social organization by standing for concrete policy alternatives that materialized a revolutionary political project. This included (but was not limited to): demands for quality housing ("A WORKPLACE WE PAY RENT FOR!"),⁹⁶ vacations from housework, welfare, all-day free daycare centers, free and non-coerced medical care, and, of course, wages for housework ("Now and Retroactive").⁹⁷ In short, a new world had to be established—a new form of social organization—beyond patriarchal structures.

For example, in 1976, BWWFH held a public meeting that organizers described as "a tremendous success in bringing together Black women"⁹⁸ to share their experiences on how the budget crisis affected women's life: including dialogs about housework, welfare cuts, the city university, daycare and "victories of women internationally."⁹⁹ It also featured "a presentation on the struggle of Black women, particularly Black welfare mothers, against

⁹² Heide, *supra* note 17, at 5.

⁹³ See LOUISE TOUPIN, *WAGES FOR HOUSEWORK: A HISTORY OF AN INTERNATIONAL FEMINIST MOVEMENT, 1972–77* (Käthe Roth trans., 2018), for a history of the international Wages for Housework Campaign, its political orientation, actions and significance within feminist activism

⁹⁴ SILVIA FEDERICI & ARLEN AUSTIN, *WAGES FOR HOUSEWORK THE NEW YORK COMMITTEE 1972-1977: HISTORY, THEORY, DOCUMENTS 101–06* (2nd ed. 2018).

⁹⁵ *See id.*

⁹⁶ *Id.* at 63.

⁹⁷ *Id.* at 61, 71.

⁹⁸ *Id.* at 116.

⁹⁹ *Id.*

forced sterilization.”¹⁰⁰ Their emphasis on forced sterilization reflected activists’ first-hand knowledge of what scholar Dorothy E. Roberts later identified as the peak of the infamous “government-sponsored family-planning programs [that] not only encouraged Black women to use birth control but coerced them into being sterilized.”¹⁰¹

Though BWWFH took the lead in the fight against sterilization, NYWFH had also articulated this demand in earlier years. A 1975 pamphlet on forced sterilization by NYWFH said that WFH meant “the power to resist forced sterilization as well as forced maternity.”¹⁰² Even more, it required “the power to decide whether or not we [women] want to have children, when, how many, and under what condition.”¹⁰³ The question was placed outside the abortion/no-abortion, sterilization/no-sterilization binaries and onto a broader inquiry over the conditions of possibility for childbearing. At issue, instead, was how to organize care and production as matters of freedom. Both groups were deeply critical of the government’s sterilization policies *and* of resorting to back-alley abortions due to the lack of access to safe abortions.¹⁰⁴ The abortion question was only intelligible within a broader narrative of the conditions that restricted women’s freedom—functionally subordinated to the campaigns’ critique of the economic expropriation of women’s (unpaid house) work.

D. Feminist Freedom as a Conversation

Though NOW was the largest feminist organization, it was still only one group within a larger activist milieu. The NWRO and Wages for Housework groups, amongst thousands of others, were part of an implicit feminist symposium. NOW’s demands are best understood in this broader context. On the one hand, at the national level, NOW was deliberate in its efforts to cooperate with other groups, fostering dialogue in the hope of assembling a united front. At the local level, many of the organization’s members also

¹⁰⁰ FEDERICI & AUSTIN, *supra* note 94.

¹⁰¹ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 56 (1997).

Roberts showed government sponsored forced sterilization peaked in the 1970s. *See id.*

¹⁰² FEDERICI & AUSTIN, *supra* note 94, at 54.

¹⁰³ *Id.* To modern readers acquainted with the organization If/When/How: Lawyers for Reproductive Justice, this formulation may sound familiar, but the WFH campaign positioned it in quite different terms: dependent on the demand of wages for housework. *See* IF/WHEN/HOW: LAWYERS FOR REPRODUCTIVE JUSTICE, <https://ifwhenhow.org> [<https://perma.cc/EVU2-3AH3>].

¹⁰⁴ FEDERICI & AUSTIN, *supra* note 94, at 56–61.

participated in other feminist groups or projects, readily connecting the different feminist venues.

Feminist print culture reveals this broad diversity, from pamphlets to newsletters to magazines to how-to guides, including how to start a daycare,¹⁰⁵ how to fix a car,¹⁰⁶ and women-made health guides.¹⁰⁷ Contraception and abortion providers could usually be found alongside self-care programs. Neither quantitatively nor qualitatively was abortion particularly significant within this culture. An emblematic example, condensing several feminist resources, was the 1973 *New Woman's Survival Catalog* (*Catalog*), which “meant, above all, to be a self-help tool for ALL women to take control of

¹⁰⁵ See, e.g., Vicki Breitbart, *Child Care—Who Cares?*, in WOMEN'S LIBERATION: NOTES ON CHILD CARE 1 (1968) (on file with Schlesinger Library, Wini Breines Papers, Box 1, F.2); The Louis Riel Univ. Fam. Co-op, *Children Are Only Little People*, in WOMEN'S LIBERATION: NOTES ON CHILD CARE 8 (1968) (on file with Schlesinger Library, Wini Breines Papers, Box 1, F.2); Rosalyn Baxandell, *Cooperative Nurseries*, in WOMEN'S LIBERATION: NOTES ON CHILD CARE 18 (1968) (on file with Schlesinger Library, Wini Breines Papers, Box 1, F.2).

¹⁰⁶ See, e.g., PEOPLES PRESS, A PEOPLES CAR REPAIR MANUAL: FIXING BRAKES (1972) (on file with Schlesinger Library, MC 995, Box 11, F.11) (discussing how to repair a car designed for women without the prior knowledge to do so). The manual's preface opened with the following note “[t]his section is written by and for women, but we hope men will read it too” to then present the image of a woman who was “frightened of cars” and felt that “machines chewed at her” to then invite women to overcome their fears. *Id.*

¹⁰⁷ Perhaps the most famous and widely distributed was the Boston Women's Healthcare Collective *Our Bodies, Ourselves: A Book by and For Women*. See *Our Bodies Ourselves Today, Our Bodies, Ourselves: The Nine U.S. Editions* (Sept., 2022), <https://www.ourbodiesourselves.org/about-us/our-history/publications/our-bodies-ourselves-the-nine-u-s-editions> [<https://perma.cc/Y7CF-XS7E>]. The first iteration of what would be the book, was a booklet called *Women and their Bodies: A Course* published by New England Free Press in 1970, which was followed by a new edition in which the collective changed the cover and name of the booklet to *Our Bodies, Ourselves: A Course by and for Women* in 1971. See *id.* In 1973, they launched a second edition which was published by Simon and Schuster, followed by a third and fourth edition, called *Our Bodies, Ourselves: A Book By and For Women, Revised and Expanded*, in 1976 and 1979 respectively. See *id.* The third and fourth editions constituted a “major revision of the book, with new content and new topics” as the authors invited “more women to contribute their expertise and experience.” *Id.* The first four editions were widely distributed among activists. Anecdotally, one of the interviewees in HBO's *The Janes*, interview Crystal O., a black woman who had visited the Janes when she accompanied her friend to get an abortion commented that in that visit, she got a copy of *Our Bodies, Ourselves* which was available for free in the waiting area. She said, “I guess that's where I got my sex education 'cause I did read that book from beginning to (laughs) yeah.” *THE JANES* (HBO 2022). The documentary's recreation scene shows the third or fourth edition. Though because of the year it could have only been either version of the first edition, probably the second. More editions followed. The book has been adapted and updated up to its last edition in 2011. But there is a break between the 1979 edition and those which followed. Not only did the aesthetic change, but according to the organization, the book was “[c]ompletely rewritten, the 1984 edition expands to 647 pages (from 383) and includes new chapters.” *Our Bodies Ourselves Today, Our Bodies, Ourselves: The Nine U.S. Editions* (Sept., 2022), <https://www.ourbodiesourselves.org/about-us/our-history/publications/our-bodies-ourselves-the-nine-u-s-editions> [<https://perma.cc/Y7CF-XS7E>].

their lives.”¹⁰⁸ The catalog consisted of a massive set of feminist resources divided into nine areas: communications, art, self-health, children, learning, self-defense, work and money, getting justice, and building the movement.¹⁰⁹ Pieces went from legal aid resources to journal subscriptions to poems, seminars, and everything in between.

Among thousands of others, the *Catalog* included 13 pieces by some of NOW’s branches.¹¹⁰ The litigation section contained an extract on the NOW Legal Defense and Education Fund’s (NOW LDEF) campaign “to end sex-role stereotyping and the consequent discrimination against women, as well as to change the underlying values.”¹¹¹ The Legal Defense and Education Fund had been separated from NOW in 1970 to function as its education and litigation affiliate. In order to be classified by the IRS as a 501(c)(3) organization (that is, tax-exempt and, more importantly, able to receive tax-deductible contributions), it needed to operate exclusively for charitable, educational, or scientific purposes.¹¹² NOW LDEF maintained its affiliation with NOW but operated independently, without engaging in activities on behalf of candidates running for public office and limiting its lobbying expenditures to maintain its tax status.¹¹³ Abortion as a central theme was wholly absent from the 13 NOW items in the *Catalog*, which instead consisted of handbooks dedicated mainly to women’s depiction in the media and employment issues.¹¹⁴

¹⁰⁸ THE NEW WOMAN’S SURVIVAL CATALOG 7 (Kirsten Grimstad & Susan Rennie eds., 1973).

¹⁰⁹ *Id.*

¹¹⁰ *See generally id.*

¹¹¹ *Id.* at 189.

¹¹² *See* 26 U.S.C. § 501(c)(3).

¹¹³ Memorandum from the Now Legal Defense and Education Fund on How to Seek Support for Cases and Projects 2 (Sept.1987) (on file with Schlesinger Library, MC 623, Box 33, F. 5).

¹¹⁴ *See* THE NEW WOMAN’S SURVIVAL CATALOG, *supra* note 108, at 17, 29, 164, 175, 186, 200, 207, 211. The ten national NOW pieces included a NOW Federal Communications Kit designed to help confront controversial issues such as “childcare, ERA, etc.” when stations failed to present balanced views, The NOW Press Handbook, NOW’s newsletter, a poster of the employment sex discrimination campaign (“Hire him, he’s got legs”), a manual designed to help women with credit, a handbook for suffragettes in the corporate space, a Business and Industry Discrimination Kit, a handbook for effective letter writing, a page-long presentation of the organization including its statement of purpose, frequently asked questions, and a list of some of its publications. *Id.* The page-long presentation included a section on the “Goals of NOW” that listed the “Equal Rights Amendment, [c]hild [c]are [c]enters, [a]nti-poverty measures, [c]ontrol of women’s rights to reproduction, [e]nforce [l]aw [b]anning [s]ex [d]iscrimination in [e]mployment, [e]qual [e]ducation [o]pportunities, [p]artnership [m]arriage and [r]esponsible [d]ivorce [r]eform.” *Id.* at 207. The New York NOW piece was about

All of NOW's pieces related in some way to the law, seeking efficient ways to transform it, helping women enforce it, or simply mobilizing it to criticize sexist practices.¹¹⁵ More generally, though abortion did not feature in any of NOW's pieces, it did emerge among the *Catalog's* concerns.¹¹⁶ It appeared prominently in the self-health section and sporadically in stickers, patches, and other feminist merchandise.¹¹⁷ Nevertheless, even then, it was a species of the self-health genre—a larger preoccupation with women's power in healthcare.

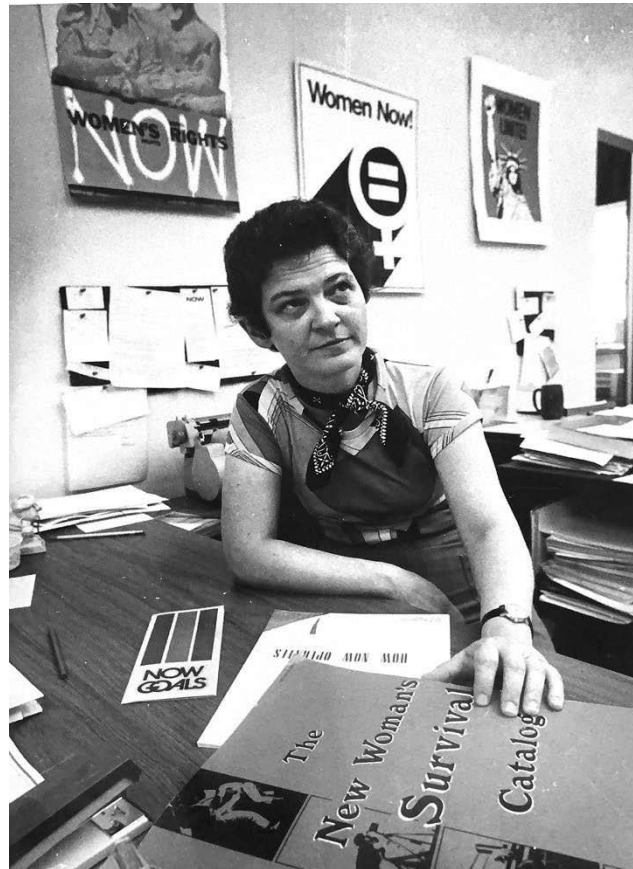
feminist speakers. *Id.* at 19. The section promoted three speakers; one was particularly interested in “attracting younger members,” one was “an authority on abortion and contraception,” and one was a “frequent speaker on ‘The Images of Women.’” *Id.* The Eastern Massachusetts NOW promoted a handbook titled *Sex Discrimination in Employment: What to Know About It, What to Do About It*. *Id.* at 186.

¹¹⁵ See generally *id.*

¹¹⁶ See generally THE NEW WOMAN'S SURVIVAL CATALOG, *supra* note 108.

¹¹⁷ *Id.*

Figure 1. NOW regional director and National Board member Mary Jean Collins at the organization's office in Chicago with *The New Woman's Survival Catalog*. Photograph of Mary Jean Collins (on file with Schlesinger Library, MC 493, PD. 2).



III. ABORTION WITHOUT ROE (OR REPRODUCTION THROUGH THE LENS OF FEMINIST FREEDOM)

A. Abortion

Across the 1960s and 1970s, for NOW, the NWRO, NYWFH, BWWFH, and feminists with innumerable other affiliations, abortion as a “women’s issue” was regarded as one more knot to disentangle within a complex web of structures of patriarchal dominance. In the *Catalog*, abortion was considered part of self-health—a program more generally concerned

with defying male dominance in healthcare.¹¹⁸ Self-health activism rebelled against the status quo that relegated women to passivity vis-à-vis (overwhelmingly male) doctors. It included all phases of healthcare, from knowing one's anatomy to the provision of treatment when needed.¹¹⁹ Self-health guides and institutions empowered women to discover their needs and take matters into their own hands. At every step of the way, women's knowledge and *praxis* contested the medical mainstream's monopoly over healthcare.¹²⁰ Women identified the course of treatment, defined the way in which it would be provided, and delivered the service.

More broadly, self-health was part of the women's health movement, a feminist healthcare crusade.¹²¹ Across the United States, particularly in large cities, feminist collectives delivered women the education and services the medical establishment had denied them. By 1975, the women's healthcare movement had 1200 groups, and at least 42 feminist clinics were operating that year.¹²² As a part of this canvas, abortion was but one of many ways to question the production and use of medical knowledge. Feminist health centers were crafted as spaces defiant of male dominance, aimed at "making real changes in the imbalance of power."¹²³ Even at the cost of efficiency and internal tensions, managing the centers through a horizontal and democratic administration was paramount to most activists. In addition to more conventional services, several centers offered cervical explorations and group gynecological sessions.¹²⁴ Abortion was another item in the long list of

¹¹⁸ *See id.*

¹¹⁹ *Id.* at 71–91.

¹²⁰ *Id.*

¹²¹ *See* MORGEN, *supra* note 65; DUDLEY-SHOTWELL, *supra* note 65 (describing the feminist "self-help" movement that encouraged women to study medicine and treat themselves).

¹²² SPAIN, *supra*, note 65, at 113, 138.

¹²³ THE NEW WOMAN'S SURVIVAL CATALOG, *supra* note 108, at 71. The statement was made by the California group Feminist Women's Health Center that started out as a Los Angeles based self-help group, grew into a women's health center, and developed several self-help groups as well as two additional women's health centers, one in Santa Ana and one in Oakland. *Feminist Women's Health Centers*, in THE NEW WOMAN'S SURVIVAL CATALOG, *supra* note 108, at 71.

¹²⁴ Cervical explorations usually consisted of all-female group sessions of mutual anatomical discovery. Author, *The Second Wave*, in THE NEW WOMAN'S SURVIVAL CATALOG, *supra* note 108, at 73. In the words of one assistant:

When I first saw another woman's cervix, I thought that it was pretty gruesome, and why were all these women excited about it? Then, when I saw my own, I couldn't believe that now I actually had access to it. [...] I became overwhelmingly awed, and even spiritual! Recovering from the spiritual part of this pretty quickly, I realized that by regular examination I, too, could have some part in keeping myself healthy.

Id.

feminist healthcare services. In this context, even when abortion was the main focus, how it would be delivered was a vital part of the question.¹²⁵

The JANE collective—an underground abortion service that operated from 1969 to 1973 in Chicago—was deeply concerned with women’s power.¹²⁶ Of course, providing safe abortions despite its criminalization was paramount, but so was providing them in a way that recognized and returned women’s command over their lives and decisions.¹²⁷ Members of the

¹²⁵ JANE was the name that stuck in 1969 for the anonymous and personalized phonenumber administered by University of Chicago students that provided abortion counseling and referrals. *A View from the Loop: The Women’s Health Movement in Chicago*, HEALTHRIGHT (on file with McCormick Library, Northwestern University, Box 6, F. 10). Women looking to terminate a pregnancy would get connected to providers by the counselling line attended by “Jane.” *Id.* The abortion hook that started as a one-woman enterprise soon became a group effort. *Id.* In time, JANE not only counseled but also secured a space to directly provide abortions performed by third parties. *Id.* Members of the collective would accompany women all through the process to ensure they felt secure and cared for. *Id.* The building where the services were delivered emulated a home environment as it was important to members of JANE that patients felt comfortable and at ease. *Id.* Members of the collective established closer relations with the providers and began assisting the procedures. *A View from the Loop: The Women’s Health Movement in Chicago*, HEALTHRIGHT (on file with McCormick Library, Northwestern University, Box 6, F. 10). When they found out that their main provider was not a doctor but a knowledgeable health worker, JANE began to wonder whether it would be best for them to personally perform the abortions. *Id.* They started learning and eventually took over the operation. *Id.* By 1971, all counseling and abortions were provided by JANE. *Id.* They charged a fee for their services but accommodated women who could not pay. *Id.* They took pride in never denying an abortion to someone who could not afford it. *Id.* In May of 1972, seven members of JANE were arrested under the charges of committing and conspiring to commit abortions, but the charges were dropped after the Supreme Court decided *Roe v. Wade* the next year. *A View from the Loop: The Women’s Health Movement in Chicago*, HEALTHRIGHT (on file with McCormick Library, Northwestern University, Box 6, F. 10); *Roe v. Wade*, 410 U.S. 113 (1973).

¹²⁶ See LAURA KAPLAN, *THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE* (2019), for a history of the JANE abortion service written by one of its members.

¹²⁷ At that point abortion was a criminal offense in Illinois under ILL. REV. STAT. ch. 38, § 23-1 (1971):

(a) A person commits abortion when he uses any instrument, medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished. A person convicted of abortion shall be imprisoned in the penitentiary from one to 10 years.

(b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery

collective took special care that the spaces in which they gathered women and their companions—known as “The Front”—to take them to where the abortions would be performed—known as “The Place”—were amenable and warm.¹²⁸ Many activists recall the significance of the affective-emotional component of the service. Accompanying women that were often scared to death by explaining everything in detail and supporting them through the procedure, holding their hand, or offering other forms of physical reassurance was as important as providing access to abortion.¹²⁹ Initially, the procedure was performed by a man the JANEs believed was a physician.¹³⁰ The situation changed after they discovered he was not, and from then on, JANE members performed the abortions.¹³¹ As JANEs personally provided abortions to women in need in the space they had built, they offered women a much-needed abortion service, as much as feminist self-affirmation through collective and intentional care.

Even in NOW, the most moderate arm of the movement, the terms by which activists would struggle for abortion were not clear-cut. In a confidential letter to some of NOW’s key leaders in 1970, Betty Friedan reproached New York NOW chapter’s decision to oppose the New York abortion repeal bill proposal. According to Friedan, New York NOW opposed the legislation “because it mentions [d]octors; that will prevent midwives [from] performing abortions, or something like that” in circumstances that the bill had been “drawn up as a result of NOW’s position on abortion.”¹³² To Friedan, this kind of thinking was irresponsible at best

in all its branches and in a licensed hospital or other licensed facility
because necessary for the preservation of the woman's life.

Id.

¹²⁸ See *JANE: AN ABORTION SERVICE* (Women Make Movies 1996), for activists’ description of the process.

¹²⁹ The service provided an experience intentionally different from the one women would receive from the medical establishment:

[T]he woman seeking an abortion] was included. She was in control. Rather than being a passive recipient, a patient, she was expected to participate. Jane said, “We don’t do this to you, but with you.” By letting each woman know beforehand what to expect during the abortion and the recovery stage, and then talking with her step by step through the abortion itself, group members attempted to give each woman a sense of her own personal power in a situation in which most women felt powerless. Jane tried to create an environment in which women could take back their bodies, and by doing so, take back their lives.

KAPLAN, *supra* note 126, at 10; *see also* *JANE: AN ABORTION SERVICE*, *supra* note 128.

¹³⁰ KAPLAN, *supra* note 126, at 119.

¹³¹ *Id.*

¹³² Letter from Betty Friedan, Cofounder of the Nat’l Org. for Women, to Kay, Aileen, and Eliza 7 (Feb. 12, 1970) (emphasis omitted) (on file with Schlesinger Library, MC 575, Box 126,

and ill-intentioned at worst.¹³³ In any case, irrespective of strategic considerations, the disagreement between the New York NOW chapter and Friedan was also substantive. They simply did not concur on how central the question of who would perform an abortion was vis-à-vis decriminalization. The New York NOW chapter and Friedan had differing visions of the contours of the abortion question and their relative importance.

As a matter of national politics, while “NOW played a crucial role”¹³⁴ in the formation of the National Association to Repeal Abortion Laws (NARAL), when it weighed in on abortion, it usually did so as part of a larger strategy that exceeded the abortion question. For example, in a 1969 memo to NOW’s leaders, Executive Director Dolores Alexander invited chapters and regions to consider a new attack on abortion restrictions which would “probably . . . be proposed by Congresswoman Shirley Chisholm at a press conference . . . after the weekend of board meetings of the new National Association to Repeal Abortion Laws.”¹³⁵ Chisholm was the first African

F. 1536c). In the Spring of 1970, Betty Friedan left the presidency after a quarrel with the organization’s Executive Director and the New York NOW Board of Directors. *Id.* at 3. The dispute involved both personal and political reasons; including questions of character, strategy, and homophobia—the disagreement over abortion did not appear to be decisive for the break, but an example of their incompatible strategies. *See id.* at 6. It constituted, in the eyes of Friedan, one more example of New York chapter’s misalignment with the national board. *Id.* With regards to the proposed abortion legislation, she emphasized:

But it is a genuine repeal bill; it removes abortion from the criminal code, and recognizes the right of a women [sic] not to bear a child against her will. [A]nd to get medical help in so going. Jean Faust and I and various others from NOW are working for it, but lately people have been stopping me and saying “I like [w]hat you say, but not your organization. They don’t really want to do a[n]ything about abortion.

Id. at 7–8.

¹³³ Friedan’s accusation of the New York chapter’s unconscious opposition to the repeal bill was the second example her letter offered of the “political blindness” she ascribed to the group, the first one was their purportedly “lesbian tactics.” *Id.* In her turn of the millennium memoirs, Friedan would look back and recall how several “shock tactics of the radical fringe” of the movement appeared to be the work of the FBI. *See* FRIEDAN, *supra* note 26, at 223. Although she did not publicly claim that was the case with the New York abortion quarrel, she did refer to the “radical lesbian fringe” which included the New York chapter. *Id.* at 224. As to the grounding of Friedan’s suspicions, the FBI did in fact investigate the women’s movement, but to date no record has substantiated her claim that lesbian feminists who pushed for the inclusion of sexuality in NOW’s agenda were planted by the government. RACHEL SHTEIR, *BETTY FRIEDAN: MAGNIFICENT DISRUPTER* 173, 203 (2023).

¹³⁴ Memorandum from Dolores Alexander, Executive Director of NOW, on Freedom for Women Week to NOW Officers (on file with Schlesinger Library, MC 575, Box 121, F. 1473).

¹³⁵ In the memo “to all NOW officers, board members, chapter presidents and convenors” among other matters, Alexander broadcasted good news on abortion: “you should all be aware

American woman to serve in Congress and would soon become the first to seek a major party presidential nomination.¹³⁶ Formed as a community activist, Chisholm's politics were profoundly tied to her commitment to the "have-nots" and included fighting for increased federal funding for education, daycare, and a guaranteed minimum income for all families.¹³⁷ It is not coincidental that NOW's convergence with NARAL was over an issue that also concerned Chisholm, herself a NOW member.

As abortion did not feature as NOW's central demand, the group's alliance with organizations that favored abortion's decriminalization was not inevitable but contingent upon their programmatic convergence, as the example that follows illustrates. In 1971, Southwest Foundation conducted an experiment on birth control "involving 398 women—of whom 80 per cent were Mexican-Americans—", half of which had been referred to the foundation's clinic by Planned Parenthood in San Antonio, Texas.¹³⁸ In response, NOW's national board decided to "urge its 200 chapters to seek legislation in every state to prohibit medical experimentation on women through public health services such as Planned Parenthood."¹³⁹ The clinical trial performed on Chicana women NOW was protesting against resulted in the pregnancy of several participants who had been "under the impression they had been taking birth control pills."¹⁴⁰ In the board's eyes, Planned Parenthood's involvement in the San Antonio birth control experiment constituted not only an abusive practice but one that reflected women's—and, particularly, low-income women's—general powerlessness against

that the California Supreme Court ruled in favor of Dr. Leon Belous, who was testing the old California abortion law." *Id.* Emphasizing that, "this was the case which the California chapters were supporting" and which "the national board voted in favor of the approval of an amicus brief at the June board meeting in San Francisco." *Id.* In view of this decision, Dolores pointed regional conferences "might want to consider a new frontal attack on abortion" and stressed that "[a]s you know, abortion is one issue about which the young women—both students and working women—of this country feel very strongly about and are ready to take action on." *Id.* Here, abortion was one more issue on which the organization participated, notably, its significance appeared to be crossed by a generational divide. *Id.*

¹³⁶ CHISHOLM '72: UNBOUGHT & UNBOSSSED (Realside Productions 2004).

¹³⁷ *Chisholm, Shirley Anita, US House of Representatives: History, Art & Archives*, [https://history.house.gov/People/Listing/C/CHISHOLM,-Shirley-Anita-\(C000371\)](https://history.house.gov/People/Listing/C/CHISHOLM,-Shirley-Anita-(C000371)) [<https://perma.cc/25M2-PLU7>]. However, she did not think of herself primarily as "an innovator in the field of legislation" and "often chose to work outside the established system." *Id.*; see generally SHIRLEY CHISHOLM, UNBOUGHT AND UNBOSSSED: EXPANDED 40TH ANNIVERSARY EDITION (Scott Simpson ed., 2010) (discussing her own rise from growing up in Brooklyn to Congress); BARBARA WINSLOW, SHIRLEY CHISHOLM: CATALYST FOR CHANGE (2013) (discussing the impacts that Chisholm had on education and equal pay policy, especially for women).

¹³⁸ David Shute, *Hilliard Addresses 'Pill' Study*, SAN ANTONIO EXPRESS, July 7, 1971, at 8-D.

¹³⁹ Press Release, Nat'l Org. for Women, NOW Board Concludes Atlanta Meeting (Nov., 1971) (on file with Schlesinger Library, MC 496, Box. 200, F. 8).

¹⁴⁰ *Id.*

corporate interests.¹⁴¹ NOW collaborated with Planned Parenthood on other projects, but, as the Chicana medical experimentation abuse exposed, their ideological alignment was not straightforward.

At the same time, NOW vehemently opposed the “so-called state protective laws” that discriminated against women at the state level by setting labor regulations differentiated by sex.¹⁴² The organization called out that such restrictions were a “subterfuge for depriving women of good jobs and promotions.”¹⁴³ Though NOWers did not refer to laws prohibiting medical experimentation as protective legislation, what they demanded from the law in those cases was precisely that which they opposed in the labor setting: for the legislator to decide what was in women’s best interest and to ban what went against it. To be sure, feminists were rightly skeptical of legislative measures that materially excluded women from higher paying positions.¹⁴⁴ But regardless of the particularities of each scenario, these examples reveal how the opposition to or endorsement of “protective” legislation—be it in the area of labor or consent in the context of medical experimentation—was not a one-size-fits-all matter, but a politically sensitive debate that depended on the underlying circumstances. Feminist freedom was no *laissez-faire* and could require “protective” legislation or be abridged by it. The evaluation depended on the particular conditions of the prohibition. The autonomy NOW reclaimed at the workplace was decidedly not the legislative protection it promoted in favor of poor women against institutionalized medical abuses.

¹⁴¹ According to a Texas news article, “Mexican-American groups have denounced the project because it included a number of low-income, poorly educated, Mexican-American women.” Shute, *supra* note 138.

¹⁴² NOW scrutinized the state protective laws “with the goal of extending to men the protections that are genuinely needed; and of the abolition of those obsolete restrictions that today operated to the economic disadvantage of women by depriving them of equal opportunity.” Memorandum from Nat’l Org. for Women on Chronological Summary of National Organization for Women Conference Resolutions, Policies, and Board Decisions, 1966–1971 (on file with Schlesinger Library, MC 496, Box 1, F. 7).

¹⁴³ NOW opposed labor laws that discriminated against women by setting differentiated standards by reason of sex. Among these, it included maximum hours, “unfair weight-limit restrictions,” and prohibitions that excluded qualified women from “white collar jobs aboard ships.” Press Release, Nat’l Org. for Women, An Invitation to Join N.O.W. National Organization for Women (Nov. 1967) (on file with Schlesinger Library, MC 496, Box 1, F. 2).

¹⁴⁴ Their calls would be heard in *Weeks v. Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969), where NOWers ecstatically celebrated their judicial triumph and disseminated their achievement in a two-page press release. See Press Release, Nat’l Org. for Women, Southern Belles Beat Southern Bell (Apr. 27, 1971) (on file with Schlesinger Library MC 496, Carton 200, F. 8).

NOW conceived of abortion, sterilization, and even labor protections as particular instances in which women reclaimed their freedom. But for freedom to be meaningful, women ought to have sufficient power to exert it. For NOWers, women's power was conditioned by economic, social, and cultural circumstances. A meaningful exercise of their freedom required a series of material preconditions. As shown by the different contexts in which NOW assessed how a particular law would impair or further women's freedom, power was quintessential. In the NOW New York and Friedan schism, for the local chapter, matrons' power was as significant as that of women seeking abortions; for Friedan and the majority of the organization, the latter was more significant. Similarly, in the case of women wronged by protective-labor legislation, power laid on their side, and the law would only impede them from exercising their freedom. In the case of medical-abuse legislation (protecting women's bodily integrity by disavowing their consent), women's freedom required addressing the material inequality that led poor women to be more exposed to the abuses of the medical establishment.

B. The "Texas Case" and the ERA

For NOWers, "the Texas case" (as the *New York Times* had referred to *Roe v. Wade* when it came out) did not inaugurate abortion as a feminist issue.¹⁴⁵ Abortion had been a concern for many of its activists since before the organization's formation, and it had officially entered NOW's agenda at its Second Annual Conference in 1967.¹⁴⁶ But, more notably, when the decision came out, it did not have any significant effect on the organization's

¹⁴⁵The *New York Times* featured the case on its cover, under that day's headline "Lyndon Johnson, 36th President, is Dead; Was Architect of 'Great Society' Program." *Lyndon Johnson, 36th President, is Dead; Was Architect of 'Great Society' Program*, N.Y. TIMES (Jan. 23, 1973), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0122.html> [https://perma.cc/YB7Z-64T9]. The January 23, 1973, front page of the *Times* read: "High Court Rules Abortions Legal the First 3 Months." *High Court Rules Abortions Legal the First 3 Months*, N.Y. TIMES (Jan. 23, 1973), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0122.html> [https://perma.cc/YB7Z-64T9]. The newspaper's front page referred to the Supreme Court, the legality of state bans on abortion, and reactions to the new decision. *Id.* There was no mention of the case name, *Roe v. Wade*. *See id.* In the entire paper, there were only two specific references to the case. *Id.* The first, contained in the body of one of the articles, clarified that "[i]n the Texas case, 'Jane Roe' an unmarried pregnant woman who was allowed to bring the case without further identity, was the only plaintiff." Warren Weaver, *National Guidelines Set by 7-to-2 Vote*, (Jan. 23, 1973), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0122.html> [https://perma.cc/YB7Z-64T9]. The second, and last, corresponded to the ordinary identification of the case before describing its content: "[f]ollowing are excerpts from . . . Jane Roe v. Henry Wade, the Texas abortion case." *Excerpts From Abortion Case*, (Jan. 23, 1973), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0122.html> [https://perma.cc/YB7Z-64T9]. Thus, notwithstanding the decision's presence in the paper the case, *qua* case was barely mentioned. Despite the five articles and other pieces that covered the decision, in addition to its noticeable appearance on the cover, the words "Roe" or "Roe v. Wade" were only uttered twice. *See id.*

¹⁴⁶ *See* NAT'L ORG. FOR WOMEN, THE FIRST FIVE YEARS 1966–1971, *supra* note 75, at 7.

priorities. It neither advanced nor demoted abortion's relative position within the vast array of feminist demands. Even when *Roe* came out, *feminist freedom* (or feminism without *Roe*) remained the leading framework for almost a decade. Before the decision, NOW had occasionally referred to abortion, but mentions were sporadic and less significant for the organization than equal rights (not necessarily seen as "judicially enforceable entitlements") and other economic demands.¹⁴⁷ Abortion was by no means their primary concern. Far more critical, for example, were the ERA and child care.

For instance, a 1973 booklet that broadcasted NOW's accomplishments in childcare stated that

[c]hild development in this country is a top priority of the National Organization for Women (NOW). We have yet to realize this dream, but NOW chapters in every state are actively working towards the goal . . . to establish a network of developmental childcare centers, free from sexism. We are catalysts, organizers, and dedicated feminists who won't change our minds - or the subject.¹⁴⁸

No comparable publication spoke of abortion in those terms at the time. Precisely the year the Supreme Court recognized a woman's (and her doctor's) constitutional right to abortion, NOW was far more concerned with what society ought to do once a child was born into the world, and the responsibility over her upbringing was laid on her mother's shoulders by Americans' social, economic, cultural, and institutional arrangements. As part of a larger canvass of *feminist freedom*, abortion needed to be read with the myriad of other efforts directed at securing women's power so they could meaningfully exercise their freedom.

So unremarkable was the judicial debate over abortion that when the Supreme Court decided *Roe v. Wade*, there was no explicit mention of it in

¹⁴⁷ In 1969, Betty Friedan had listed an abortion case among the "concrete victories . . . won by NOW in 1969." Letter from Betty Friedan, President of NOW, to All Members of NOW (1969) (on file with Schlesinger Library, MC 499, Box 3, F. 3). The list included *Bowe v. Colgate-Palmolive Company*, 416 F.2d 711 (7th Cir. 1969), where the Seventh Circuit ruled that employers cannot exclude women from jobs requiring lifting 35 pounds or more. *Id.* The memo noted this decision followed *Weeks v. Southern Bell Telephone & Telegram Company*, 408 F.2d 228 (5th Cir. 1969). *Id.* The memo celebrated the NOW legal committee which "did the pioneering work in both cases." *Id.* The memo also celebrated the "landmark decision by the California Supreme Court" which "ruled that the old California criminal law on abortion was 'an invalid infringement upon the woman's constitutional rights' under the 14th Amendment." *Id.*

¹⁴⁸ TERY ZIMMERMAN, NOW'S CHILD CARE ACCOMPLISHMENTS 1 (1973) (on file with Schlesinger Library, MC 496, Carton 42, F. 37).

NOW's press releases.¹⁴⁹ In the entire year, there was no mention of *Roe v. Wade*, nor any other abortion case.¹⁵⁰ It was not that the organization was indifferent to abortion (NOW had, after all, already taken a stance on the matter and commented on other abortion decisions), but rather that both abortion and *Roe* were not as significant to the organization as they would eventually become.¹⁵¹

NOW's annual conference occurred in mid-February of 1973, less than a month after *Roe v. Wade* was decided. A chilly Washington, D.C. witnessed a delegation of (mostly) women and men claim "the future is RevolutionNOW [sic]" as they defined strategies and routes for the year.¹⁵² Gathered at a hotel two blocks north of the White House (where a different President's Day celebration was taking place), activists could almost grasp the sense of urgency that had invigorated the organization from its very formation.¹⁵³ Would 1973 be the year the ERA would finally be ratified? Would the organization succeed in its aspiration "to bring women into full

¹⁴⁹ See Press Releases, Nat'l Org. for Women (Jan.–Aug. 1973) (on file with Schlesinger Library, MC 496, Carton 200, F. 10); Press Releases, Nat'l Org. for Women (Sept.–Dec. 1973) (on file with Schlesinger Library, MC 496, Carton 200, and F. 11).

¹⁵⁰ *Id.*

¹⁵¹ For example, the December 6, 1969, Board meeting's decision to urge members to use the judicial decisions on labor and abortion to demand their rights. Memorandum from the NOW Board of Directors, Chronological Summary of National Organization for Women Conference Resolutions, Policies, and Board Decisions, 1966–1971 (1974) (on file with Schlesinger Library, MC 496, Box 1, F. 7). The abortion decision was made by California's Supreme Court in *People v. Belous*. See generally *People v. Belous*, 458 P.2d 194 (Cal. 1969). The summary of the meeting reflected the board's decision to "[c]all upon women to use the new court decisions to demand their right to abortion and to jobs of their choice." Memorandum from the NOW Board of Directors, Chronological Summary of National Organization for Women Conference Resolutions, Policies, and Board Decisions, 1966–1971 (1974) (on file with Schlesinger Library, MC 496, Box 1, F. 7). More generally, the organization had broadcasted other judicial decisions, for example on April 27, 1971, NOW issued a two-page release about *Weeks v. Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969) that began by communicating that "[i]n a landmark decision, a woman who charged Southern Bell Telephone Company with sex discrimination has been awarded \$31,000 in pay back." Press Release, Nat'l Org. for Women, Southern Belles Beat Southern Bell (Apr. 27, 1971) (on file with Schlesinger Library MC 496, Carton 200, F. 8).

¹⁵² NAT'L ORG. FOR WOMEN, THE FUTURE IS REVOLUTIONNOW (Feb. 17-19, 1973) (on file with Schlesinger Library, MC 496, Box 21, F. 1).

¹⁵³ President's Day weekend underscored the organization's historical claims. The conference commemorated past activists and their contribution to the cause. See generally *id.* Its cover was a bright orange with a picture of Elizabeth Cady Stanton and Lucretia Mott. *Id.* Most saliently, the mythical 1848 Seneca Falls Declaration of Sentiments appeared in the conference's booklet next to Chisholm's funding-deficit campaign. *Id.* at 6–7. Donations were collected to help the defeated presidential candidate Shirley Crimson overcome the large campaign deficit her electoral endeavor had left. *Id.* at 6. Echoing her campaign motto, the call for donations read "Shirley Chisholm, unbosomed and unbought" along a Langston Hughes quote, both written in a hand-written looking font in white letters over a black figure of two slightly connected ovals, next to which small black machine-typed letters completed ". . . AND UNFUNDED" as it proceeded to give the contribution's details. *Id.*

participation in the mainstream of American society . . . ?”¹⁵⁴ The year 1972 had brought relative success; the foremost celebration concerned NOW’s achievements against labor discrimination,¹⁵⁵ which it declared its highest priority, alongside the ERA’s ratification.¹⁵⁶ There was room for optimism.

NOW had every reason to be hopeful as it continued to advocate for women against what they viewed as their most pressing problems. Poverty was one such problem, and the Conference resolved to make 1973 NOW’s Action Year Against Poverty.¹⁵⁷ The organization’s 400 chapters would coordinate their efforts through a national task force that would concentrate on “four legislative goals” revising

[t]he Fair Labor Standards Act and similar state laws to provide for a minimum wage of at least \$2.50 per hour¹⁵⁸ and extension of the Act to include all workers, including domestics; passage of a comprehensive developmental child care program; complete overhaul of the welfare programs to eliminate variations in requirements and payments; and passage of legislation to provide for a full employment program for the United States¹⁵⁹

As reflected in their legislative goals, for NOW, economic deprivation, labor, and feminist freedom were inextricably linked.

Tellingly, the booklet of that conference featured—presumably for the first time—“choice” in an official national NOW publication: “Right to Choice/The Power to Choose.”¹⁶⁰ In what would be the year against poverty, and had recently seen *Roe v. Wade*, NOW underscored the potential of “choice” as a vehicle for women’s freedom for the first time. However, the

¹⁵⁴ Press Release, Nat’l Org. for Women’s Temp. Steering Comm., An Invitation to Join – September, 1966 (Sept. 1966) (on file with Schlesinger Library, MC 496, Box 1, F. 2).

¹⁵⁵ See TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE, *supra* note 29, at 39.

¹⁵⁶ See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 817 (2004).

¹⁵⁷ Press Release, Nat’l Org. for Women, For Immediate Release on 6th National Conference (1973) (on file with Smith College, Aileen C. Hernandez Papers, Box 81).

¹⁵⁸ \$2.50 per hour in 1973 is equivalent to \$17.89 in 2023. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/8CL3-GW44>].

¹⁵⁹ *Id.*; In 1974, NOW succeeded in including domestic workers under the purview of the Fair Labor Standards Act, the other legislative goals remain pendant.

¹⁶⁰ See NAT’L ORG. FOR WOMEN, THE FUTURE IS REVOLUTIONNOW, *supra* note 152.

choice in question was not abortion but career advancement.¹⁶¹ The other side of the economic struggle labor women confronted, the one “career women” faced, was choice in these terms. Most activists probably missed the concept’s debut as they skimmed through the conference booklet’s pages. After all, the small and unremarkable letter ad of “[f]eminist [c]areer [w]orkshops for [o]n the job problems; getting past the wall of male prejudice” that featured choice and “OPTIONS, unlimited” was not likely to draw much attention.¹⁶²

The booklet also contained other career-related ads,¹⁶³ feminist merchandise,¹⁶⁴ various activists’ bios and recommended publications for women and by women.¹⁶⁵ Reading the longer articles in the booklet the dual components of *feminist freedom*—political and economic—come into clear view.¹⁶⁶ The conference’s resolutions were primarily economic and aimed at working-class women; minimum wage, daycare, and the inclusion of domestic workers under labor legislation were directly intended to improve the conditions of women trapped on the “muddy floor” (as opposed to those unable to break the “glass ceiling”). In contrast, the content of the services and networks fostered in the conference, also economic, revealed its primarily middle-class constituency, more interested in bringing women into spaces traditionally reserved for men.

If NOW’s economic preoccupations revealed the organization’s class composition, the political ancestors it invoked expressed a unitary notion of feminist citizenship that went from Sojourner Truth, through the suffragettes, and finally to Betty Friedan and Shirley Chisholm. From different political lineages, they all underscored the importance of women’s

¹⁶¹ See TURK, EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE, *supra* note 29, at 126–73, for a historical account of feminists’ struggles and visions for rights in the workplace, and their different iterations depending on women’s class and race.

¹⁶² See NAT’L ORG. FOR WOMEN, THE FUTURE IS REVOLUTIONNOW, *supra* note 155, at 13. In retrospect, the resemblance to the language that later characterized abortion and choice was so striking that one might almost think the ad was actually encoded. However, the workshops took place in New York where abortion was already legal even before the decision. Moreover, Janice LaRouche, the woman who imparted the workshops would go on along with Regina Ryan to write a book on the topic. See generally JANICE LAROCHE & REGINA RYAN, JANICE LAROCHE’S STRATEGIES FOR WOMEN AT WORK (1985).

¹⁶³ NAT’L ORG. FOR WOMEN, THE FUTURE IS REVOLUTIONNOW, *supra* note 152, at 11–12 (“How to Start a Business on High Hopes and a Shoestring” and “The Death of the Dead-End Secretary”).

¹⁶⁴ *Id.* at 15 (“Products for feminists by feminists”).

¹⁶⁵ *Id.* at 13 (“The Tenant Survival Book” and “The Young Woman’s Guide to Liberation”).

¹⁶⁶ See *id.* at 4–7. Those articles are “Herstory of Now,” “NOW Bill of Rights,” and “Declaration of Sentiments, Seneca Falls, 1848.” *Id.*

freedom and equality for a capacious understanding of feminist citizenship.¹⁶⁷ This unitary view undergirded NOW's attempts to overcome racial and class contradictions within the organization. A concerned organization committed to re-examining its policies and structures to ensure they did not inhibit minorities' participation. Activists also established a sliding scale for membership dues starting at zero dollars to democratize NOW's constituency.¹⁶⁸

Besides choice's undetectable first appearance, the intense three-day reunion endowed NOWers with renewed drive and purposes for the coming months.¹⁶⁹ After all, what had started as a group of 28 women six-and-a-half years ago had grown into a national organization that had since achieved numerous victories.¹⁷⁰ From NOW's standpoint, those victories did not pertain to abortion in any significant way. Several states had repealed or modified their restrictive abortion laws, and many feminists had been involved. However, that had not been a significant organizational priority. Instead, most of the organization's focus had been on other economic issues iterated differently across women's experiences.

¹⁶⁷ The cover of the booklet featured a picture of Susan B. Anthony and Elizabeth Cady Stanton. *Id.* at 1. The article "Herstory of NOW" summarized the organization's founding and included a picture of a smiling Betty Friedan next to the organization's Bill of Rights with a picture of Bella Abzug and three young girls. *See* NAT'L ORG. FOR WOMEN, *THE FUTURE IS REVOLUTIONNOW*, *supra* note 155, at 4–5. The booklet also included a poster with Shirley Chisholm's mono, "unbossed and unbought," with a plea for economic help to counteract the campaign deficit by adding "... and unfunded" to Chisholm's mono. *Id.* at 6. Sojourner Truth word's were reproduced in the booklet and gave the name to the theatrical production presented by NOW, titled, ... *What Time of the Night It Is*. *Id.* at 8–9 ("I'm 'round watchin' these things, and I wanted to come up and say these few things to you, and I'm glad of the hearin' you give me. I wanted to tell you a mite about Woman's Rights, and so I came out and said so. I am sittin' among you to watch; and every once and awhile I will come out and tell you that time of night it is.").

¹⁶⁸ On the press release that followed the 1973 national conference, NOW

committed itself to re-examine its own structure policies and practices to ensure that the institutional racism that has affected everyone doesn't unconsciously inhibit minority people from participating in and with NOW and established a sliding scale for its own dues (starting with \$0.00) to ensure that persons of lower economic resources and the working poor can join NOW.

Press Release, Nat'l Org. for Women, (Feb. 20, 1973) (on file with Schlesinger Library, MC 496, Carton 200, F.10).

¹⁶⁹ *See id.*

¹⁷⁰ *See generally* TURK, *EQUALITY ON TRIAL: GENDER AND RIGHTS IN THE MODERN AMERICAN WORKPLACE*, *supra* note 29; TURK, *THE WOMEN OF NOW: HOW FEMINISTS BUILT AN ORGANIZATION THAT TRANSFORMED AMERICA*, *supra* note 31.

NOW's national media releases in 1973 were predominantly about economic issues and the fight for the ERA.¹⁷¹ Among its reports were NOW's strike for economic security and ERA advocacy.¹⁷² NOW's support of the "Farah boycott" figured as a fight for all women as the organization joined the strike in solidarity with the Farah Manufacturing Company's "80% women and 95% Mexican-American" workers who were trying to get the Texas-based company to recognize their union.¹⁷³ As a part of Women's Equality Day, NOW coordinated demonstrations at Farah distributors across the country.¹⁷⁴ Meanwhile, abortion was not the central issue in any of the releases. That is, the year the United States Supreme Court decided *Roe*, NOW's press releases reflected its concern over a different Texas case—an economic boycott in which the organization expressed its solidarity with workers.

The only mention of abortion, in passing, came with another reproductive rights case. In the press release, NOW deplored the "allege[d] sterilization of two young women without the informed consent of either woman" in Alabama, stating that "the basic human right to limit one's own reproduction includes the right to all forms of birth control (contraception, including sterilization, and abortion) recognizing the dual responsibility of both sexes."¹⁷⁵ The Alabama case was that of two Black sisters; Minnie Lee

¹⁷¹ See, e.g., Press Release, Nat'l Org. for Women, (Aug., 1973) (on file with Schlesinger Library, MC 496, Carton 200, F.10) (discussing how NOW's movement was focused on economic equality).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Press Release, Nat'l Org. for Women, (July 9, 1973) (on file with Schlesinger Library, MC 496, Carton 200, F.10). NOW's Statement declared that:

The National Organization for Women (NOW) has always stood for the individual's right to control their own reproductive lives without unwarranted government intrusion. We have insisted that all people regardless of age, economic or marital status should have access to abortion and contraceptive services. We have also stated that, "the basic human right to limit one's own reproduction includes the right to all forms of birth control (contraception, including sterilization, and abortion) recognizing the dual responsibilities of both sexes." The Alabama case alleges the sterilization of two young women without the informed consent of either women or the informed consent of their mother in the instance of the mentally retarded woman. As a civil rights organization, we deplore any acts which involve coercion and limit the individual's right of choice. In the absence of any specific guidelines for federal programs with regard to the insurance of the rights of minors, particularly their right to give informed consent, together with no clear federal policy regarding these same matters in the case of the mentally retarded minor, we support the institution of a ban on the use of federal funds for the sterilization of minors until such matters can be debated in

and Mary Alice Relf, age 14 and 12, respectively. Justified solely by their illiterate mother's "mark on what was later learned to be an authorization for surgical sterilization," the two girls had been forcibly sterilized at their public hospital.¹⁷⁶ In its press release, NOW used the label "young women" to refer to the Relf sisters, contrary to the complaint's preference for the term "children."¹⁷⁷ Whereas the variance was partly a reflection of the interventions' different forums and objectives, it also exposed an underlying tension between protection and autonomy. The stakes in delineating minor's sexuality were high. NOWers were probably aware of the racial undertones of the question, even as they failed to mention the "young women[s]" race.¹⁷⁸ The Relf sisters' suit would later be consolidated with another forced sterilization case the National Welfare Rights Organization was litigating, which would be jointly decided in 1974.¹⁷⁹ Though abortion's mention in the release was anecdotal, it expressed the material ways in which a bare choice—disconnected from socio-economical structures of power—was not the issue.

In previous years, the tone of NOW's press releases had been very much the same. Labor discrimination, the ERA, poverty, and media representation

open public discussion and clear policy protective of the rights of individuals set forth.

Id.

¹⁷⁶ Complaint at 9, *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974) (No. 73-cv-01557). Additionally, a nurse had "required [14-year-old] Minnie to sign a false document stating that she was over twenty-one years old and gave consent to the operation." *Id.* According to the complaint, "Minnie did not understand or what the document meant or authorized." *Id.* The complaint also included their older sister, Katie Relf (age 17). *Id.* The Relf sisters had moved to a public housing project in 1971 where "the Family Planning Service" had "began the unsolicited administration of experimental birth control injections to Katie." *Id.* The Court held that "federally assisted family planning sterilizations are permissible only with the voluntary, knowing and uncoerced consent of individuals competent to give such consent." *Relf v. Weinberger*, 372 F. Supp. 1196, 1201 (D.D.C. 1974).

¹⁷⁷ *Compare* Press Release, Nat'l Org. for Women, (July 9, 1973) (on file with Schlesinger Library, MC 496, Carton 200, F.10) *with* Complaint at 8, *Relf v. Weinberger*, 372 F. Supp. 1196 (No. 73-cv-01557).

¹⁷⁸ *Compare* Press Release, Nat'l Org. for Women, (July 9, 1973) (on file with Schlesinger Library, MC 496, Carton 200, F.10) (failing to mention the Relf sisters' race) *with* Press Release, Nat'l Org. for Women, NOW Board Concludes Atlanta Meeting (Nov., 1971) (on file with Schlesinger Library, MC 496, Box. 200, F.8) (mentioning that the women in a similar case were "Chicana"). For women of color, the risk of reproductive abuse, be it through forced sterilization or pharmacological experimentation, was a reality in a way it simply was not for their white counterparts. *See* Shute, *supra* note 1418.

¹⁷⁹ *Relf*, 372 F. Supp. at 1204.

were the most prevalent issues.¹⁸⁰ During its first decade, NOW concentrated its energies on challenging unjust working conditions for women. Class tensions between the professional and the “low-skilled” women laborers, which more often than not also reflected racial divisions, surfaced in the oscillation between the different workplaces and professional interests the organization defended. Still, NOW’s concern with economic freedom in women’s homes and workplaces was evident.¹⁸¹ Abortion ought to be read as part of this larger canvas of feminist freedom.

NOW’s media releases provide an essential glimpse into the organization’s priorities. Choices had to be made to discuss specific issues, not others, in a limited space. Not only did these statements require time and resources, but they signaled with particular eloquence the issues with which the organization wanted to be associated. Considered under that lens, abortion’s first mention post-*Roe* is particularly interesting. Not only did NOW not mention the Supreme Court’s ruling in its press releases throughout 1973, it did not even mention abortion as an issue. The first mention of abortion (beyond its anecdotal appearance in the forced sterilization release) came a year after *Roe*, in relation to one of the anti-abortion constitutional amendment proposals “pro-lifers” were pushing.¹⁸² The release stressed that “most key religious groups favor legal abortion.”¹⁸³ *Roe v. Wade* as such went unmentioned.¹⁸⁴ At that point, *Roe* continued to be

¹⁸⁰ See generally Press Release, Nat’l Org. for Women, (1969) (on file with Schlesinger Library, MC 496, Carton 200, F.1); Press Release, Nat’l Org. for Women, (Nov. 21, 1966) (on file with Schlesinger Library, MC 496, Carton 200, F.2); Press Release, Nat’l Org. for Women, (Jan. 3, 1967) (on file with Schlesinger Library, MC 496, Carton 200, F.3); Press Release, Nat’l Org. for Women, (May 18, 1968) (on file with Schlesinger Library, MC 496, Carton 200, F.4); Press Release, Nat’l Org. for Women, (Apr. 9, 1969) (on file with Schlesinger Library, MC 496, Carton 200, F.5); Press Release, Nat’l Org. for Women, (Jan. 28, 1970) (on file with Schlesinger Library, MC 496, Carton 200, F.6); Press Release, Nat’l Org. for Women, (Aug. 17, 1970) (on file with Schlesinger Library, MC 496, Carton 200, F.7); Press Release, Nat’l Org. for Women, (Jan. 16, 1971) (on file with Schlesinger Library, MC 496, Carton 200, F.8); Press Release, Nat’l Org. for Women, (Jan. 3, 1972) (on file with Schlesinger Library, MC 496, Carton 200, F.9).

¹⁸¹ See *supra* note 180 and accompanying text. This was also the case for the movement at large; see, for an account of feminists’ concern with reimagining the home and workplace and their attempts to do so.

¹⁸² See Press Release, Nat’l Org. for Women, Positions of Most Key Religious Groups Favor Legal Abortion; Conflict Seen with Proposed Anti-Abortion Amendments (Mar. 6, 1974) (on file with Schlesinger Library, MC 496, Carton 200, F.12); see generally Robert N. Karrer, *The Pro-Life Movement and Its First Years Under “Roe,”* 122 AM. CATHOL. STUD. 47 (2011) (detailing a review of the “pro-life” response after *Roe*).

¹⁸³ *Id.*; Nat’l Org. for Women, Positions of Most Key Religious Groups Favor Legal Abortion; Conflict Seen with Proposed Anti-Abortion Amendments.

¹⁸⁴ See *id.*

the generic “Texas case” in which the Supreme Court had declared abortion restrictions unconstitutional subject to the new trimester framework.¹⁸⁵

In the following years, abortion slowly gained ground. The first Right to Choose lobbying day was promoted by NOW by the end of 1974.¹⁸⁶ At that point, abortion was still a matter of concern but in no way a high priority. The labor causes that had been central to the organization’s national agenda continued to figure prominently among NOW’s actions. References to abortion were made in general terms related to legal reform but continued to be infrequent, and the broad *feminist freedom* outlook still prevailed.¹⁸⁷

¹⁸⁵ See Press Release, Nat’l Org. for Women, Positions of Most Key Religious Groups Favor Legal Abortion; Conflict Seen with Proposed Anti-Abortion Amendments, *Id.* The trimester framework created in *Roe* established that during the first trimester of pregnancy “the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician,” in the period following the first trimester but before viability “the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health”, finally, after viability “the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Roe v. Wade*, 410 U.S. 113, 164–65 (1973). The trimester framework was replaced by the undue burden standard of *Planned Parenthood v. Casey*, 505 U.S. 833, 901 (1992). Under the “undue burden” standard “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 878. Subsequent cases interpreted what constituted an undue burden, and what did not. In *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000), the Court held that a Nebraska statute that criminalized “partial birth” abortions and did not allow for exceptions in cases the health of the mother was threatened, placed an undue burden on a woman’s right for abortion and was thus unconstitutional. *Id.* at 921, 946. Later, in *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007), the Court decided that Congress’ Partial-Birth Abortion Ban Act did not impose an undue burden over a women’s right to abortion as the most reasonable interpretation was that the act only applied to the intact D&E (dilation and evacuation) method and not to the more common D&E. *Id.* at 167–68. Also, the Partial-Birth Abortion Ban Act contained a life-endangerment exception, excluding from the Act “[p]artial-birth abortions . . . necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.” 18 U.S.C. § 1531. *Casey* remained law of the land until the Supreme Court overturned it and *Roe* in 2022 with *Dobbs*. See generally *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

¹⁸⁶ See ELIZABETH COX, REPORT TO THE NATIONAL NOW BOARD 2 (1974) (on file with Schlesinger Library, MC 496, Carton 51, F.12).

¹⁸⁷ See, e.g., NAT’L ORG. FOR WOMEN, IT’S OUR REVOLUTION NOW! 8TH NATIONAL NOW CONFERENCE 10–13 (Oct. 24–27, 1975) (on file with Schlesinger Library, MC 496, Box 21, F. 3) (listing a wide range of topics to be discussed during the 1975 national conference). In NOW’s 1975 National Conference, in addition to the many workshops, special interest meetings and the plenary sessions, activists were prompted to explore the philosophical “visions, ambiguities and questions” within the feminist movement including: “Seizing the

Since its founding, NOW's agenda had been characterized by a wide array of concerns. However, that dynamic was slowly starting to change. In 1975, the ERA became an organizational priority as the clock for ratification continued to tick. In a press release on the ERA that year, Eleanor Smeal, "chairone"¹⁸⁸ of NOW's National Board (who would become president in 1977), synthesized feminists' demands by claiming: "We want economic security for our grandmothers, mothers, and sisters as well as for ourselves and our descendants whether they choose to work inside or outside of the home. All women are working women!"¹⁸⁹ In Smeal's eyes, "fully equal status and treatment in the eyes of the law"¹⁹⁰ would enable women to bring about the economic security they needed to participate in society on equal terms. Thus, economic security was directly related to the fight for the ERA, which for that very reason, constituted for Smeal "a moral issue" integral to the democratic values of the nation.¹⁹¹ Notably, the choice Smeal was reclaiming in 1975 through her vindication of the ERA was not, like abortion, abridged by criminalization. Instead, the choice to work inside or outside the home was impaired by social, economic, and legal conditions that needed to be redesigned precisely to positively enable those choices.

In the larger political context, by the mid-1970s, women's legal gains were slowing, and the prospect of a federal ERA was beginning to deflate. What seemed like a certainty by the beginning of the decade was far less secure as years passed, and the rate of states' ratification diminished. Still, the situation seemed by no means insurmountable, and feminists remained optimistic. A 1976 interview with Betty Friedan headlined: "Is the women's movement losing its momentum?"¹⁹² illustrated the times' impasses for feminist hopes. Asked whether she agreed with those who said the recent state ERAs defeats were the result of a lack of connection between the movement and the average woman, Friedan responded that the New York and New Jersey state ERAs defeats were the consequence of a "campaign of lies . . . false propaganda that played into women's fears" as well as a takeover

Means of Reproduction," "Wages for Housework," "Football for Feminists," "Children in Our Lives," "Isis and Us," "Classism and Racism," "Put Your Money Where Your Movement Is," "Dealing with the Contradictions in Our Lives," "Implications of Feminism on the American Economic System," "Men in the Movement: Mystique or Mistake?" *Id.* at 10.

¹⁸⁸ The term "chairone" was used in the press release. Press Release, Nat'l Org. for Women, *The Shame of the Bicentennial* (Jan. 6, 1975) (on file with Schlesinger Library, MC 496, Carton 200, F.14).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Rhoda Anon, *Is the Women's Movement Losing Its Momentum?*, *TIMES RECORD*, Mar. 16, 1976, at 14.

of the movement “by extreme groups.”¹⁹³ Although New Jersey and New York had ratified the federal ERA in 1972, both failed to do the same in 1975 with their respective state versions, mirroring a broader trend.¹⁹⁴

While the ERA began to rise within the organization’s agenda, NOW continued to espouse many causes, among which abortion remained subordinate. In 1977, none of the national conference’s resolutions referred specifically to abortion, although the resolution on religion included it among the harms that churches had brought upon women. Along with socializing people “into accepting the values of patriarchy with its emphasis on hierarchical authority [and] its imperialistic consciousness,” the resolution against religion denounced churches’ denial to women of contraceptive information and the “right to make the moral choice of abortion.”¹⁹⁵ Thus, abortion appeared as one more instance of the quest for *feminist freedom*, a battle fought in many arenas. Religion was merely one area of concern, and not a priority at that. The organization had decided towards its second decade to focus instead on “Economic Priority Issues” including collective bargaining, full employment, childcare, and guaranteed minimum income, among others.¹⁹⁶ Thus, the ERA appeared as one more site for pursuing the economic freedom NOWers in 1977 deemed crucial.

Fittingly, NOW initiated a national boycott campaign against the unratified states. Activists set to “convince organizations to pass resolutions stating that they will not hold meetings, conferences, or conventions in states which have not ratified the ERA.”¹⁹⁷ But if NOW focused on economic issues that did not mean the plenary only considered economic matters. Other resolutions were adopted on issues that went from soliciting amnesty for all war resisters to demanding “that the churches of the United States

¹⁹³ *Id.* Among those “extremist groups” Friedan counted “[t]hings like Ms. Magazine, for instance, which trivialize the movement and give it an image that is alienating, I think, for the majority of women.” *Id.*

¹⁹⁴ See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 14 (1986).

¹⁹⁵ NAT’L ORG. FOR WOMEN, NATIONAL ANNUAL CONFERENCE “THE FUTURE IS NOW: ON TO THE SECOND DECADE” 53–54 (1977) (on file with Schlesinger Library, MC 496, Box 21, F.4).

¹⁹⁶ *Id.* at 50–51.

¹⁹⁷ Memorandum from the Nat’l Org. for Women on NOW Economic Boycott Campaign to all NOW Chapter and State Activists (Jan. 16, 1978) (on file with Schlesinger Library, MC 496, Carton 177, F.47).

undertake reparations programs in recognition of the great wrongs they have done in oppressing women and other victims of patriarchy.”¹⁹⁸

In 1978, NOW’s National Board called for a “State of Emergency” to convince Congress to extend the deadline for the ERA ratification, unambiguously committing to the amendment as the organization’s highest priority.¹⁹⁹ That same year, five years after *Roe* and for the first time, NOW invited supporters to join an “anniversary of the Supreme Court decision to legalize abortion” march.²⁰⁰ Even then, the “Texas case” was not unambiguously *Roe*. NOW did not refer to the decision in its newsletters as *Roe v. Wade* until the decision’s tenth anniversary.²⁰¹

By the end of the 1970s, NOW’s attention to abortion had decisively increased, though it continued to be the “Texas case.” On *Roe*’s anniversary in 1979, NOW sent telegrams “to all major organizations on both sides of the abortion issue, inviting leaders to meet to discuss the formation of a comprehensive reproductive health program.”²⁰² NOW was concerned with the increasing polarization around abortion and “fear[ed] . . . that the extreme climate of the crusade against abortion [was] taking on the overtones of a religious war.”²⁰³ For *Roe*’s anniversary the following year, recalibrating after the conciliation strategy failed, NOW released a 15-page press packet that included “a factsheet on major legal decisions, public opinion poll trends and legislative actions on abortion since the Supreme Court decision in 1973.”²⁰⁴ The packet also contained “an analysis of the organizational health of the various groups which make up the anti-abortion lobby and an analysis of their positions in the 1980 elections.”²⁰⁵ NOWers tried different strategies to counter the conservative backlash over abortion, an attack that had grown during recent years but had been present since before *Roe* was decided. So, while dedication to abortion had increased, *Roe* continued to be the generic

¹⁹⁸ NAT’L ORG. FOR WOMEN, NATIONAL ANNUAL CONFERENCE “THE FUTURE IS NOW: ON TO THE SECOND DECADE”, *supra* note 196, at 54, 60.

¹⁹⁹ Press Release, Nat’l Org. for Women, declaration of a State of Emergency for the Equal Rights Amendment (Mar. 1, 1978) (on file with Schlesinger Library, MC 496, Carton 200, F.18).

²⁰⁰ Press Release, N.O.W. Issues Invitation to Marchers (Jan. 17, 1978) (on file with Schlesinger Library, MC 496, Carton 200, F.18).

²⁰¹ Press Release, Statement of Judy Goldsmith, Nat’l Org. for Women President on the Ten-Year Anniversary of the Supreme Court’s Decision on Abortion (Jan. 17, 1983) (on file with Schlesinger Library, MC 496, Carton 200, F.30).

²⁰² Press Release, Statement by Eleanor Smeal 1 (Jan. 22, 1979) (on file with Schlesinger Library, MC 496, Carton 200, F.19).

²⁰³ *Id.* at 3.

²⁰⁴ Press Release, Abortion Rights -Who’s Winning; Who’s Losing? (Jan., 1980) (on file with Schlesinger Library, MC 496, Carton 200, F.20).

²⁰⁵ *Id.*

Supreme Court case, and abortion had not attained center stage. Outside NOW, the broader milieu of fellow activists and groups that had struggled for *feminist freedom* had dramatically thinned as most initiatives had either dissolved or significantly diminished.²⁰⁶

IV. ROE FEMINISM

A. ERA: *The First Single-Issue*

The single issue that concentrated NOW's energies in the early 1980s was the ratification of the ERA. Until then, the organization had always addressed multiple issues, loosely prioritizing some but never really committing to a forefront one. For a consolidated organization to so drastically change course and forego embedded practices, several pieces needed to come into place. In part, the unprecedented rise of the ERA was a response to external factors, namely, a growing politically hostile scenario and ratification's ticking clock.²⁰⁷ The original deadline passed in 1979 and Congress—after intense and successful feminist pressure—had granted a three-year extension, but in 1980 no new states had ratified the amendment (none would) and time was running out.²⁰⁸ In the broader political landscape, feminists' opportunities had significantly worsened. Even before Reagan's landslide victory, it had become clear that the “nationwide consciousness” about women's oppression Betty Friedan had enthusiastically saluted in 1969 was long gone. That year, the Republican Party withdrew its explicit support for the ERA, which had been first introduced in Congress in 1923 by two Republicans and incorporated into the party platform in 1940.²⁰⁹ In 1980,

²⁰⁶ For instance, the Combahee River Collective—an emblematic Black lesbian feminist collective—was active between 1974 and 1980. See *The Struggle*, COMBAHEE RIVER COLLECTIVE, <https://combaheerivercollective.weebly.com/history.html> [https://perma.cc/D349-U546]. The National Welfare Rights Organization was active until March 1975, when the organization “declared bankruptcy and closed its doors.” See NADASEN, *supra* note 12, at 224. The New York Wages for Housework group was active between 1973 and 1977. See FEDERICI & AUSTIN, *supra* note 94, at 11.

²⁰⁷ Whereas both factors could be described as external insofar as they exceeded the organization's dynamics, in reality, the growing political hostility was not truly external as the new-found alliance of neoliberals and conservatives that consolidated in this period had been born precisely as a response to 1960s activism and its questioning of socio-economic structures. See MELINDA COOPER, *FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM* 1–66 (2017).

²⁰⁸ MANSBRIDGE, *supra* note 194, at 13, 184.

²⁰⁹ ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA* 205 (2001) (discussing how the first ERA was introduced in Congress by Kansas Republican Rep. Anthony Daniel Read, Jr. and

instead, the Party “acknowledge[d] the legitimate efforts of those who support or oppose ratification of the Equal Rights Amendment.”²¹⁰ Moreover, for the first time, the party’s platform unequivocally opposed abortion by committing to support a constitutional amendment that would “restore protection of the right to life for unborn children” as well as backing congressional efforts to limit the use of taxpayer’s money in abortions.²¹¹ Just four years earlier, the party’s platform dealt with abortion for the first time, tepidly acknowledging that supporters and opposers of abortion coexisted within its lines.²¹²

Relatedly, while in the 1970s Democrat and Republican legislators were barely divided over abortion, by the late 1980s the issue had become tremendously polarized.²¹³ Party realignment certainly raised the stakes of the

Sen. Charles Kurtis). The Amendment had been drafted, and intensely lobbied in favor of, by Alice Paul, from the National Woman’s Party. *Id.*; S.J. Res. 21, 68th Cong. (1923); *see generally* Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman’s Party*, 71 J. AM. HIST. 43 (1984) (exploring the history of the National Woman’s Party). Although the Republican Party supported women’s equality in its 1928 Platform but not the ERA, it would be the first major party to officially endorse the ERA in 1940. *See* Gerhard Peters & John T. Woolley, *Republican Party Platform of 1928*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1928> [<https://perma.cc/T5SQ-7QKP>] (stating that the Republican party “accepts wholeheartedly equality on the part of women”); Gerhard Peters & John T. Woolley, *Republican Party Platform of 1940*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1940> [<https://perma.cc/M6XQ-ZX2F>] (stating that the Republican party “favor[s] . . . an amendment to the Constitution providing for equal rights for men and women”).

²¹⁰ Gerhard Peters & John T. Woolley, *Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1980> [<https://perma.cc/SE2J-A6CQ>].

²¹¹ *Id.*

²¹² Gerhard Peters & John T. Woolley, *Republican Party Platform of 1976*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1976> [<https://perma.cc/7AQM-R67R>]. The Republican Party Platform held:

There are those in our Party who favor complete support for the Supreme Court decision which permits abortion on demand. There are others who share sincere convictions that the Supreme Court’s decision must be changed by a constitutional amendment prohibiting all abortions. Others have yet to take a position, or they have assumed a stance somewhere in between polar positions.

Id. Note that the “Texas case” (how the *New York Times* initially referred to *Roe v. Wade*) was here too referred as the generic Supreme Court abortion decision. *Id.*; *see* Warren Weaver, *National Guidelines Set by 7-to-2 Vote*, N.Y. TIMES, Jan. 23, 1973, at 1, 20.

²¹³ *See* Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 AM. J. POL. SCI. 718, 723–25 (1997). In 1974 both Democrats and Republicans in the Senate voted in favor of diminishing abortion restrictions around 40% of the time; through the 1980s, that number would oscillate around 70% for Democrats and 20% for Republicans. *Id.* The polarization was not as stark in the House but still rose as time passed. *Id.* The split in Congress continued to grow in the following years. *Id.* By 1994, over 80% of Democrats were voting “pro-choice,” while the same percentage of Republicans was voting “pro-life.” *Id.*

abortion debate in national politics. However, it was not the leading factor for feminists' change of strategy. For one thing, activists had faced vocal "pro-lifers" intense opposition all along. Even before the major parties' realignment, feminist advocates had faced a strong militant opposition, if led by smaller organizations.²¹⁴ NOW's shifting emphasis did not tightly align with the changing trends in national politics. Moreover, the organization's priorities had never merely reflected external tendencies. The organization's inner dynamics were indispensable drivers of this transformation. External factors alone were not sufficient for NOW's drastic departure from its historically multiple practices.

For this to be possible, activists needed to find an issue malleable enough so as to credibly condense their manifold aspirations. For NOW to adopt a single-issue approach, it needed to be not-so-single and able to fit a panoply of demands. The amendment was uniquely situated to spearhead—and make possible—NOW's new strategy for three important reasons. First, the ERA was historically very significant as it represented early twentieth-century feminists' unfinished fight for freedom. The first version had been introduced a few years after the ratification of the Nineteenth Amendment.²¹⁵ This time around though, the ERA coalition had overcome past historical divisions between feminists of equality and difference—the former pushing for formal equality and the latter fighting to secure vulnerable women's protection by emphasizing their difference—uniting both factions to rally around a dual strategy (that included ratifying the 1972 ERA).²¹⁶ Second, in part for the first reason, the ERA was a particularly significant issue for the organization from early on, and, even before external pressure accumulated, the ERA had been among NOW's priorities. Third, the amendment was malleable enough that it could fit demands from widely diverse areas, making the transition to a single issue particularly palatable for activists' political sensitivities. More than an issue, the ERA was seen as an entrance point to different sets of preoccupations, which could vary through time. Its general mandate prescribed that "equality of rights under the law shall not be denied

²¹⁴ See Karrer, *supra* note 182, at 51–66 (explaining how the National Right to Life Committee emerged by connecting small "pro-life" groups in 1967 grew in the decade that followed).

²¹⁵ See MANSBRIDGE, *supra* note 20894, at 8, 19.

²¹⁶ See generally Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755 (2004) (discussing the history of the ERA campaigns and the successful unification of both sectors under the dual strategy that included fighting for the ratification of the 1972 amendment and litigating to push for a judicial interpretation of the Fourteenth Amendment that furthered its protection on account of sex). This was during the Lochner Era in which many "feminists of difference" opted for a protectionist agenda hoping to secure whatever labor protections they could win in the hopes of then extending them to their male coworkers. *Id.*

or abridged . . . on account of sex”²¹⁷ for which, as a legal tool, the amendment could serve to protect women in a wide array of areas. In that sense, the amendment’s ambiguity offered a feasible escape valve in a time of political loss. The only requirement was the involvement of state or federal action. Finally, the amendment would mean that Congress would be able to enforce sex’s equal protection through legislation.

Thus, when NOW LDEF commissioned its vice president, Jane Trahey, to develop a five-year plan for the organization in 1980, it is not surprising that she reported she had “become convinced that the most important part . . . of [organizational] planning is the examination and clarification of organizational purpose, goal and program strategy” and that she was “convinced that the ERA is central to anything NOW LDEF is and does.”²¹⁸ That is not to say that the ERA instantly became everything, but its centrality definitely rearranged NOW’s agenda, which from then on was articulated in the context of the function of the amendment.²¹⁹ NOW’s multiple task forces and area groups increasingly dedicated their energies to ERA efforts.²²⁰ As

²¹⁷ Equal Rights Amendment, H.R.J. Res. 208, 92d Cong. § 1 (1972).

²¹⁸ Memorandum of a Five-Year Plan from Jane Trahey to Executive Committee and All Board Members of the National Organization for Women Legal Defense and Education Fund (1980) (on file with Schlesinger Library, MC 623, Box 34, F.10) Jane Trahey was co-Vice President of the NOW LDEF Board of Directors (along with Gene Boyer and Sandra Jenkins). *Id.*

²¹⁹ NAT’L ORG. FOR WOMEN, NOW-LDEF PROPOSAL FOR STUDENT TRAINING PROPOSAL (1989) (on file with Schlesinger Library, MC 623, Box 95, F.2). In 1980, NOW LDEF declared that its priorities included the ERA impact project and litigation in “employment discrimination, educational equity, family issues, and the proposed federal Equal Rights Amendment,” all of which could be retraced backed to the amendment. *Id.*

²²⁰ In the organization’s annual conferences, the ERA increasingly gained terrain as the foremost issue. Many rights related to the constitutional amendment figured in the organization’s discussions. This multiplicity is reflected in NOW’s national conferences. *See* NAT’L ORG. FOR WOMEN, 6TH ANNUAL CONFERENCE (1973) (on file with Schlesinger Library, MC 496, Box 21, F.1); NAT’L ORG. FOR WOMEN, 7TH ANNUAL CONFERENCE (1974) (on file with Schlesinger Library, MC 496, Box 21, F.2); NAT’L ORG. FOR WOMEN, 8TH ANNUAL CONFERENCE (1975) (on file with Schlesinger Library, MC 496, Box 21, F.3); NAT’L ORG. FOR WOMEN, 9TH ANNUAL CONFERENCE (1976) on file with Schlesinger Library, MC 496, Box 21, F.4); NAT’L ORG. FOR WOMEN, 10TH ANNUAL CONFERENCE (1977) on file with Schlesinger Library, MC 496, Box 21, F.5); NAT’L ORG. FOR WOMEN, 11TH ANNUAL CONFERENCE (1978): NAT’L ORG. FOR WOMEN, 12TH ANNUAL CONFERENCE (1979) on file with Schlesinger Library, MC 496, Box 21, F.6); NAT’L ORG. FOR WOMEN, 13TH ANNUAL CONFERENCE (1980) (on file with Schlesinger Library, MC 496, Box 21, F.7); NAT’L ORG. FOR WOMEN, 14TH ANNUAL CONFERENCE (1981) (on file with Schlesinger Library, MC 496, Box 21, F.8); NAT’L ORG. FOR WOMEN, 15TH ANNUAL CONFERENCE (1982) (on file with Schlesinger Library, MC 496, Box 21, F.9); NAT’L ORG. FOR WOMEN, 16TH ANNUAL CONFERENCE (1983) (on file with Schlesinger Library, MC 496, Box 21, F.10); NAT’L ORG. FOR WOMEN, 17TH ANNUAL CONFERENCE (1984) (on file with Schlesinger Library, MC 496, Box 21, F.11); NAT’L ORG. FOR WOMEN, 18TH ANNUAL CONFERENCE on file with Schlesinger Library, MC 496, Box 21, F.12).

the ticking clock precipitated, the ERA's rise reflected a strategic, as much as substantive, shift within the organization.

As the ERA became the organization's single issue, it constituted a hinge between feminists' former capacious legal imagination and the rearrangement that would follow. The constitutional formula for women's equality partially sacrificed the rich texture of the local expressions of the feminist projects of the previous decade to be able to accommodate a more manageable formula. The trade-off for these lowered ambitions was a wider political reach. Even if less radical in questioning the social order, the constitutional reform strategy offered an opportunity for change on a larger scale.

To be sure, feminists had deployed the law all along *feminist freedom*, pressing and adapting it to produce the myriad of institutions they built during that period. But the ERA was not that. It was an abstract promise of constitutional equality whose substance would have to be filled in time by feminists' concrete aspirations. By compromising on a rule that could fit within the standards of national politics, women from Alabama to Wyoming would be able to claim their legal equality with a democratically backed constitutional basis. For activists, this meant that even in a hostile scenario of worsening economic conditions and decreasing popular sympathy, they could secure a substantial legal gain at the national level. This gain, they hoped, would enable further conquests of economic freedom. So, as the smaller efforts died out, the larger national organizations coalesced in backing the constitutional amendment that they hoped would bring part of the 1970s *feminist freedom* into the United States' highest law.²²¹ Feminist's hopes therefore largely relied on constitutional reform. The amendment, activists thought, would consolidate a decade of transformation and symbolically entrench the nation's commitment to gender equality; while its open texture meant that its precise reach would only be determined in the future, through its application. Further, by vesting Congress with the power to enforce the

²²¹ Press Release, Nat'l Org. for Women, Economic Boycott Campaign for the ERA (1978) (on file with Schlesinger Library, MC 496, Carton 177, F.47). By 1978, 82 associations had pledged to boycott states that had failed to ratify the ERA. *Id.* A few notable within those included were the: Church Women United, Coalition of Labor Union Women, Council of Nurse Researchers of the American Nurses' Association, Federally Employed Women, Feminist Law Students Association (University of Santa Clara), Leadership Conference of Women and Religion, League of Women Voters, National Assembly of Women Religious, National Association of Social Workers, National Conference of Puerto Rican Women, National Federation of Business and Professional Women's Clubs, National Woman's Party, National Women's Political Caucus, Political Action Committee of American Nurses' Association, Society of Women Engineers, United Auto Workers, Women's Caucus of National Legal Aid & Defender Association, Women in Communications, Women's Equity Action League, Women's Lobby and Women's Ordination Conference (Catholic). *Id.*

amendment, many hoped a new relation between the Federal government and the states could be pressed so the former could come to the rescue to secure and expand the scope of the ERA's protections.

Thus, when the amendment was finally defeated in 1982²²² (for a time, at least), it dashed even modest feminist hopes of bringing women into the (moderately transformed) mainstream while the more sweeping and multiple feminist institutions of the quest for *feminist freedom* continued their retreat. By the time the ERA's extended deadline ran out, the myriad of feminist politics and projects that had proliferated earlier in the decade had shrunk to fit abstract women's rights ideals. The capacious visions of rights and freedom activists had pushed forward—through daycare projects, employment fights, self-help health centers, and reclaiming women's image—moved to the backseat.²²³

When the ERA failed, NOW never truly resumed its far-reaching agenda, and the new issue that steadily rose to occupy the void left by the ERA was abortion, paradigmatically personified in *Roe*. Devoid of both the breadth of the bottom-up local initiatives that strove to re-imagine women's position in society and the broader reach of the top-down abstract institutionalization of gender equality in the Constitution, abortion seemed to be all that remained for feminist activists to reclaim. Feminists, in part, responded to a changing political landscape by reorganizing their priorities to maximize their chances of success in an ever-steeper ascent. Yet, conservative backlash alone was not the reason why abortion gained prominence; it had been a constant (if through changing conservative alliances) since before *Roe*.²²⁴ Moreover, even as intense conservative backlash against abortion consolidated in 1980, NOW decidedly prioritized the ERA instead.

B. *A New Single-Issue: Judicially Enforceable Abortion Rights*

A year after the extended deadline for the ERA had run out—in 1983—activists commemorated *Roe v. Wade*'s tenth anniversary.²²⁵ For the first time, the decision would be remembered as more than the abortion case. This time,

²²² MANSBRIDGE, *supra* note 194, at 13.

²²³ See *supra* notes 100–102, for more information.

²²⁴ See Karrer, *supra* note 182, at 49–51 (analyzing growing coalition of conservative resistance to feminist activism). See generally MARY ZIEGLER, *DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT* (2022) and COOPER, *supra* note 211, for an analysis of the growing coalition of conservative resistance to feminist activism.

²²⁵ Statement of Judy Goldsmith, *supra* note 201 (“The National Organization for Women, on this, the tenth anniversary of *Roe v. Wade*, reaffirms the right of women to manage their reproductive lives, without government interference and without coercion.”).

it was simply referred to as *Roe v. Wade*.²²⁶ The once “Texas case” seemed to offer a window of hope, a possible place to articulate the remaining energies and focus feminist efforts to secure another freedom—or prevent its future erosion. *Roe* would come to occupy the void produced when the organization assumed a single-issue strategy but was then bereft of an issue when the ERA failed.

The early history of NOW and other feminist groups shows that while choice and abortion were part of feminist demands from the beginning, they were by no means the extent of the conversation and were not understood in binary terms. As the previous sections showed, when feminists were concerned with abortion during the early 1970s, it represented much more than decriminalization.²²⁷ A sign held by an activist at an August 1972 town meeting in Lake Placid eloquently summarized: “We’re not pro-

²²⁶ *Id.*; NAT’L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND EDUCATION FUND 1983–1984 Annual Report (1983) (on file with Schlesinger Library, MC 623, Box 348, F.12).

²²⁷ Much more because it challenged the structural sexual imbalance of power, it was one strike (among many) at the status quo. Collective self-education and empowerment was another major component of feminist activism in relation to abortion. *See* N.Y. WOMEN’S HEALTH AND ABORTION PROJECT, A SHORT READING LIST FOR WOMEN WHO WANT TO TALK TO EACH OTHER ABOUT THEIR BODIES AND THEIR HEALTH 2–4 (1971) (on file with Schlesinger Library, MC 543, Box 20, F.8). For example, in 1971 the N.Y. Women’s Health and Abortion Project crafted and distributed a booklet titled *A Short Reading List for Women Who Want to Talk to Each Other About Their Bodies and Their Health*. *Id.* The booklet was intended to offer women a guiding route to start a health self-education group:

Any woman can organize a series of discussions about women’s sexual and reproductive systems” the introduction began, inviting women to take charge of their own bodies and health collectively in discussion. Although the booklet contained a reading list, resources that could without much ado be taken as a personal bibliography, the purpose of the collection was explicitly to open discussion, to join women to uncover their bodies and their health. Recognizing women already knew plenty, the introduction argued, they are largely unable to access said knowledge as “it is buried in a haphazard collection of private experiences

Id. Thus, the solution was to “get together and pool knowledge and experience.” *Id.* As a way out of individual’s blindness, collective experience would offer a route. Moreover, the process would empower women to fight back against the pressures that affected their lives. *See id.* In the words of the reading lists’ authors:

[I]t’s important that we do this; choices such as what form of birth control to use, how to choose a doctor, where to get an abortion can no longer be treated as purely personal matters, there are too many other interests -drug companies, population controllers, health planners, that are already making decisions about us and our lives.

Id. Thus, to be able to decide “what we need and what we want” women needed to get together and foster their shared knowledge. *Id.* Against social and market pressures, the project offered women freedom. *See id.*

appendectomy, pro-tonsillectomy or pro-abortion. We're for a free choice."²²⁸ Remarkably, freedom complemented choice. Freedom of choice was indeed part of the conversation in the early 1970s but did not monopolize it. To the extent that choice was part of the debate, the primary term was freedom more than choice. As uttered by feminists, in its very syntax, freedom was more encompassing than choice as it allowed for an overarching redefinition of one's conditions and circumstances, whereas the later predilection for choice presupposed that the alternatives were somewhat predetermined.

Throughout most of the 1970s, NOW's focus was not on litigation, and within its litigation efforts, abortion was not significant at all. As abortion rose within the organization's priorities, so did its focus on litigation. By the same token, litigation's increasing centrality as a strategy was tied to a progressively abortion-centered caseload.

During the 1970s, NOW LDEF's participation in abortion litigation was virtually inexistent. In 1973, NOW LDEF participated in nine court cases, none of which pertained to abortion.²²⁹ In 1974, as presented by NOW LDEF, "[s]ome of the major issues included equal pay, discrimination in higher education, the constitutionality of benign preference, and the right to disability payments for pregnancy or pregnancy-related illness."²³⁰ The most significant cases that year were *Johnson v. University of Pittsburgh* and *Cussler v. University of Maryland*. According to the report, they were "landmark Title VII lawsuits, filed in support of the Fund's belief in the importance of opening higher as well as lower education positions to women on an equal basis with men."²³¹ Out of the ten cases the report mentioned, only one concerned abortion—*Westby v. Doe*, a challenge to the denial of Medicaid payments for abortion.²³²

²²⁸ Maurice Carroll, *Pro-Abortionists Greet Governor: Attend Town Meetings in Bid to Counter Opposition*, N.Y. TIMES, Nov. 23, 1972, at 17. "Free-choice" activists had presumptively gathered in one of Governor Rockefeller's town meetings in response to the increasing presence of anti-abortion activists throughout his series of town meetings. *Id.*

²²⁹ See NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1973 ANNUAL REPORT 1 (1973) (on file with Schlesinger Library, MC 623, Box 348, F.8). At that point, NOW LDEF's could only participate in litigation through amicus curiae briefs and "minor financial support" as it did not have enough funds to "open a litigation office and hire staff attorneys." *Id.* For NOW LDEF's origin and role, see *supra* text accompanying notes 108–10.

²³⁰ NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1974 ANNUAL REPORT 5 (1974) (on file with Schlesinger Library, MC 623, Box 348, F.8).

²³¹ *Id.*

²³² *Id.*

In 1975, NOW LDEF's primary focus continued to be the *Johnson* case, and abortion was altogether absent from the fund's priorities.²³³ NOW LDEF's reported that "our major lawsuit of the year is aimed at breaking down the barriers that have prevented one well-qualified woman from moving up to the top levels of her profession."²³⁴ The plaintiff, Sharon Johnson (a biochemistry professor), sued the University of Pittsburg after it denied her tenure "while two male professors with lesser qualifications" obtained tenure that year.²³⁵ NOW LDEF's report also featured three cases as "litigation of special importance:" one "involving the custody rights of a lesbian mother," one on labor discrimination of federal employees, and one on pension discrimination on account of sex.²³⁶

NOW LDEF's heavy investment "in the Sharon Johnson case," believing that "this case can open historic doors for professional women in the same way Robert's Southern Bell Telephone case opened doors for blue-collar women,"²³⁷ once again signaled how the fates of blue- and white-collar female workers appeared to be fundamentally connected in the eyes of NOW. What mattered was that at least some women attained key positions as "[a]ll women will benefit when some women attain decision-making positions in business, education, and public service."²³⁸ While many of the campaigns and efforts the organization had pushed in its first decade consisted mainly of expanding the decision-making possibilities of all

²³³ NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1975 ANNUAL REPORT (1975) (on file with Schlesinger Library, MC 623, Box 348, F.8).

²³⁴ *Id.* at 3.

²³⁵ NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1975 ANNUAL REPORT 6 (1975) (on file with Schlesinger Library, MC 623, Box 348, F.8). It was the first case in which the organization directly represented a plaintiff. *Id.* The representation was assumed for no fee by Sylvia Roberts, NOW LDEF's general counsel and only attorney at the time. *Id.*; see NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1974 ANNUAL REPORT 1 (1974) (on file with Schlesinger Library, MC 623, Box 348, F. 8) (discussing how Sylvia Roberts was the only attorney at the time). She remained as the only full-time attorney until 1977 when Phyllis N. Segal joined the staff as legal director. See NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1977 ANNUAL REPORT 1 (1977) (on file with Schlesinger Library, MC 623, Box 348, F. 8). By 1980, the fund had two staff attorneys (Susan K. Blumenthal and Judith L. Avner) and one Law Clerk (Kim E. Greene). See NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1980 ANNUAL REPORT 14 (1980) (on file with Schlesinger Library, MC 623, Box 348, F. 10); Memorandum from Stephanie J. Clohesy to the Nominating Committee (1980) (on file with Schlesinger Library, MC 623, Box 34, F. 10).

²³⁶ See NAT'L ORG. FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND 1975 ANNUAL REPORT 7 (1975) (on file with Schlesinger Library, MC 623, Box 348, F. 8).

²³⁷ *Id.* at 6.

²³⁸ *Id.*

women, as conditions changed, their efforts began to focus more on some women (not coincidentally, white-collar women).

The caseload pattern continued throughout the decade, and until 1979, neither abortion nor reproductive rights in general, appeared as an organizational priority. In fact, between 1976 and 1979, NOW LDEF barely participated (as an *amici*) in one abortion case and even that case was not designated as a priority in any way.²³⁹

When the ERA's ratification failed, feminists' strategies came to rest increasingly on abortion, and, in turn, abortion came to be conceived of primarily as a judicially enforceable right to choose. This can be readily seen in how NOW LDEF's focus on litigation began to increase. While during the early 1980s NOW had focused its resources on the Project on Equal Education Rights (PEER), which represented NOW LDEF's highest expenditures in 1981 and 1983, Figure 2 shows that as the decade progressed, more resources were dedicated to litigation. In parallel, by 1980, the myriad of feminist projects—health centers, magazines, consciousness-raising groups, communes, popular daycares, art centers, and bookstores—that had extended across the country had drastically diminished.²⁴⁰

Courts' reputation as productive venues to pursue social change was a necessary condition for NOW's turn to litigation, but the timing by which the turn took place cannot be explained by the courts' good name (amongst social reformers) alone. Common sense attributed a significant portion of the Civil Rights Movement's victories to successful litigation.²⁴¹ The Warren Court's shadow still lingered strongly among progressives and gave activists hope for the possibilities of the judicial strategy. But courts had become attractive for social progressives earlier, increasingly in the 1960s, and with force in the early 1970s, but NOW did not decidedly turn to them then.²⁴² While litigation had always been a part of NOW's agenda, until the 1980s it had remained secondary as compared to NOW LDEF's other projects.

²³⁹ See generally *McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976).

²⁴⁰ SPAIN, *supra* note 65, at 38.

²⁴¹ See Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 88 (1994) and GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008), for accounts over how the significance of the judiciary over civil rights has been overestimated.

²⁴² See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1975). This 1975 Harvard Law Review article was the seminal work on the transformation of litigation and justice's role within it. In it, Chayes argued that litigation had transitioned from a traditional model of adjudication in which justices were concerned with specific parties and their past conducts, to a public law litigation model in which decisions were "not a dispute between private individuals about private rights, but a grievance about the operation of public policy." *Id.* Chayes was not implying that disputes were not presented in terms of rights to the court but that their resolution pertained to a policy decision more than the adjudication of rights with respect to a past conduct. *Id.*

During the mid-1980s, abortion increasingly gained importance, but its character as an organizational priority was far from clear. In 1980, for the first time, reproductive freedom appeared among NOW LDEF's litigation priorities.²⁴³ That year, it featured alongside the ERA Impact Project, family law, employment, and education equity only to disappear from the picture again in 1981 (otherwise, that year's priorities were the same as the previous).²⁴⁴ The years that followed intermittently included reproductive rights among its concerns.²⁴⁵ Only in the late 1980s, did abortion and reproductive rights finally become prominent.²⁴⁶ The first year that litigation

²⁴³ NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1980 ANNUAL REPORT 10 (1980) (on file with Schlesinger Library, MC 623, Box 348, F.10).

²⁴⁴ Compare *id.* with NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1981 ANNUAL REPORT 11–12 (1981) (on file with Schlesinger Library, MC 623, Box 348, F.11).

²⁴⁵ NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1980 ANNUAL REPORT 10 (1980) (on file with Schlesinger Library, MC 623, Box 348, F.10); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1981 ANNUAL REPORT 11–12 (1981) (on file with Schlesinger Library, MC 623, Box 348, F.11); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1982 ANNUAL REPORT 12 (1982) (on file with Schlesinger Library, MC 623, Box 348, F.12); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1983-84 ANNUAL REPORT 6 (1983-1984) (on file with Schlesinger Library, MC 623, Box 348, F.12); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1985 ANNUAL REPORT 13–18 (1985) (on file with Schlesinger Library, MC 623, Box 348, F.12); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1988 ANNUAL REPORT 7 (1988) (on file with Schlesinger Library, MC 623, Box 348, F.13).

²⁴⁶ The report for the years 1983–1984 under the heading “Law Reform” celebrated the fund’s “active participation in precedent-setting legal cases promoting women’s equality in education, employment, family law and reproductive freedom, as well as constitutional and civil rights.” NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1983-1984 ANNUAL REPORT, *supra* note 249. The title of the litigation section was “Law Reform,” which hints at the larger strategic shift the organization was beginning to dive into. *See id.* The 1985 report did not mention abortion or reproductive rights, but featured a special historic edition celebrating “fifteen years of achievement.” NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1985 ANNUAL REPORT, *supra* note 249. The historic edition included a timeline with NOW’s litigation highlights since 1967. *Id.* Though the timeline featured events for each year, the first mention of abortion was in a 1982 highlight. *Id.* (“[A]ssumes co-counsel role in *American College of Obstetrics and Gynecology v. Thornburgh* challenging Pennsylvania’s Abortion Control Act”). The other mention came in 1983, which included reproductive rights for the first time as a category (with two cases). NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1983-1984 ANNUAL REPORT, *supra* note 249. In 1984, there were again no reproductive cases among the ten cases and other special projects the fund handled. NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1984 ANNUAL REPORT, *supra* note 246. The NOW LDEF collection has no records of the 1986 and 1987 reports. However, in 1987, for the first time NOW issued an extensive report on reproductive rights to be disseminated in the form of a booklet, addressing the “major issues before Congress affecting abortion and birth control rights.” NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1988 ANNUAL REPORT, *supra* note 249; *see* NAT'L ORG. FOR WOMEN, *Major Issues Before Congress Affecting Abortion and Birth Control Rights*, in NOW REPORT ON REPRODUCTIVE RIGHTS (1987) (on file with Schlesinger Library, MC 496, Carton 210, F.63).

expenditures surpassed those of the other substantial programs (namely PEER and education), NOW LDEF's Executive Director continued to represent the organization's purpose as a broad agenda in which litigation played no particular role. On her reading, the United States had by 1984 "reached the point where *quality* is impossible without *equality*" and NOW LDEF was working in the economy, education, and the family to turn things around by providing "the missing pieces in the array of solutions to America's pressing problems."²⁴⁷

In 1988, NOW LDEF dedicated its report in a special edition "to the Class of 2000," who were first graders at the time.²⁴⁸ The report declared that year's priorities, to be equal employment law, family law, and economic supports, including insurance and pensions.²⁴⁹ Still, even in a year with a marked commitment to economic redress, a case count of the litigation docket of the report reveals that abortion was third in importance, following employment and family law cases.²⁵⁰

As abortion rose within the organization's litigation docket, litigation as a strategy gained importance within LDEF's actions. While during the 1970s, litigation had been relatively unimportant for NOW's LDEF (which had invested most of its resources in education campaigns), that situation changed through the mid-1980s and by 1990 had completely reversed. As Figure 2 shows, until 1979 most of NOW LDEF's budget was spent on education, initially on Education and Public Information in general and then on PEER. Two years after the ERA deadline ran out, LDEF spent \$626,192 on litigation (equivalent to \$1,770,410.7 in November 2022 when adjusted for inflation), which was the highest litigation expenditure at the time. It was also the first time litigation costs surpassed other areas. The peak was closely followed by 1990 when LDEF spent \$779,624 (equivalent to \$1,734,698.36 in November 2022 when adjusted for inflation). At this time, litigation costs were double any other service area when comparing percentages of total expenses.

²⁴⁷ NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1983-1984 ANNUAL REPORT, *supra* note 249, at 13.

²⁴⁸ NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1988 ANNUAL REPORT, *supra* note 249, at i.

²⁴⁹ *Id.* at 4.

²⁵⁰ The total case count, using the report's criteria is as follows: 17 employment cases, 8 reproductive rights cases, 4 economic supports for women, insurance and pensions, 12 family law, 2 discriminatory business clubs, 1 First Amendment Rights. The count could be easily further divided as out of the 17 cases classified under employment, 3 pertained to affirmative action, 4 sexual harassment, 2 pregnancy discrimination, and the rest involved discrimination in employment decisions, the scope of Title VII, and maternity leave. Conversely, 7 out of the 8 reproductive rights cases were abortion cases. *Id.*

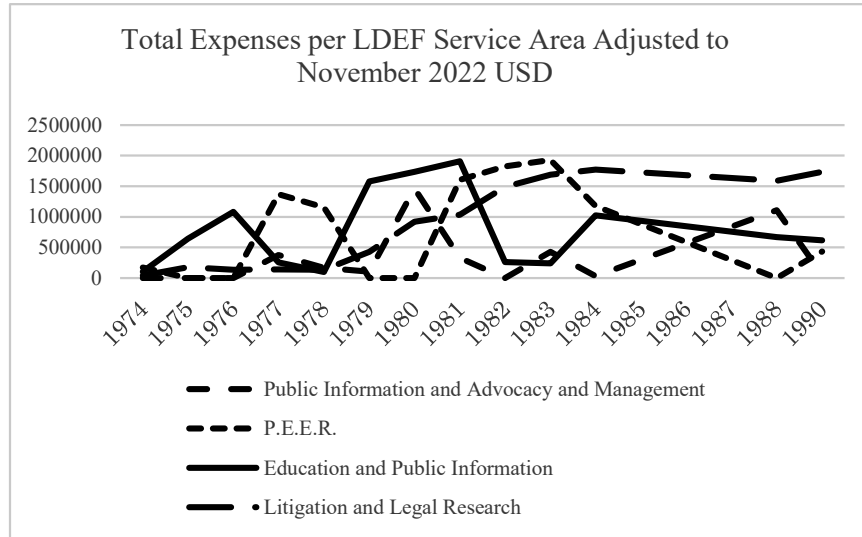


Figure 2. The graph was extrapolated by the author with data from the Annual Reports of the Legal Defense and Education Fund of NOW and the inflation data of the United States Bureau of Labor Statistics.²⁵¹

²⁵¹ *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/8CL3-GW44>]; NOW LEGAL DEFENSE AND ACTION FUND 1973 ANNUAL REPORT (1973) (on file with Schlesinger Library, MC 623, Box 348, F.8); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1974 ANNUAL REPORT (1974) (on file with Schlesinger Library, MC 623, Box 348, F.8); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1975 ANNUAL REPORT (1975) (on file with Schlesinger Library, MC 623, Box 348, F.8); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1976 ANNUAL REPORT (1976) (on file with Schlesinger Library, MC 623, Box 348, F.8); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1977 ANNUAL REPORT (1977) (on file with Schlesinger Library, MC 623, Box 348, F.8); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1978 ANNUAL REPORT (1978) (on file with Schlesinger Library, MC 623, Box 348, F.9); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1979 ANNUAL REPORT (1979) (on file with Schlesinger Library, MC 623, Box 348, F.10); NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1980 ANNUAL REPORT, *supra* note 249; NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1981 ANNUAL REPORT, *supra* note 249; NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1982 ANNUAL REPORT, *supra* note 249; NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1983-

C. *Choice: Feminists' New Legal Horizon*

Even after the extended ratification deadline ran out, the ERA continued to haunt NOW's legal imaginary until abortion definitively took over. In 1988, the organization had decided to launch a new ERA campaign, conscious that the process to ratification would be a long one. As then-President Molly Yard conveyed to her national audience, "we know that [to pass the ERA] we need to work in the elections of '88, '90, '92, '94, '96—however long it takes."²⁵² But the campaign never kicked off and instead of a march to launch the new ERA campaign, NOW led the "March for Women's Equality/Women's Lives" that year after the "Reagan/Bush Administration moved to urge the Justice Department . . . to take up *Webster v. Reproductive Health Services* for the purpose of overturning *Roe v. Wade*."²⁵³ That is, as NOWers sought to return to the single issue that first filled its agenda, they ended up dedicating those efforts to a new single issue instead: abortion.

In 1989, Yard's welcome to NOW members attending the National Conference urged them to "build a political army" as they couldn't depend "on the courts" nor "Congress" nor "most state legislatures" to defend abortion.²⁵⁴ The issue of the upcoming elections would be "the right of a woman to choose when and if to bear children, the right not to be forced to compulsory pregnancy because birth control fails."²⁵⁵ Yard reacted to the Reagan/Bush attack by opening the venues through which feminists would fight for abortion. In refusing to be confined or dependent on courts or legislatures—aspiring for a political army instead to fight the war—NOWers inadvertently assumed the terms of that war were those of choice. As Yard declared: "[w]e are in a war—a war for freedom for women. Just as we must have ERA in the Constitution to guarantee equality of rights, so we must win the right for all time to abortion. The very freedom of our lives depends on this,"²⁵⁶ she inadvertently conceded the scope of women's freedom was now that of their right to choose. In linking abortion to the ERA, assuming the

1984 ANNUAL REPORT, *supra* note 249; NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1985 ANNUAL REPORT, *supra* note 249; NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1988 ANNUAL REPORT, *supra* note 249; NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1990 ANNUAL REPORT (1990) (on file with Schlesinger Library, MC 623, Box 348, F.13).

²⁵² NAT'L ORG. FOR WOMEN, WOMEN'S VISION, VOICES, VOTES: THE FEMINIZATION OF POWER, 1988 NATIONAL NOW CONFERENCE 1 (1988) (on file with Schlesinger Library, MC 496, Box 21, F.15).

²⁵³ NAT'L ORG. FOR WOMEN, THE 1989 CONFERENCE PROGRAM BOOK 2 (1989) (on file with Schlesinger Library, MC 496, Box 21, F.16).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

former to be the righteous continuator of the latter, she situated women's fight for freedom within a new framework.

By 1990, abortion appeared in NOW presidents' speeches as prominently as the other bread-and-butter issues that had taken the organizations' attention for so long.²⁵⁷ The next year, Yard would again include abortion in her brief opening remarks in the conference's booklet, this time in relation to the Freedom of Choice Act of 1991.²⁵⁸ Whereas NOW's president presented the 1989 shift towards the March for Women's Equality/Women's Lives in part as a necessary reaction to the Executive's actions,²⁵⁹ the same caveat did not follow her 1990 nor her 1991 addresses.²⁶⁰ Yet, in all three addresses, abortion figured prominently among NOW's preoccupations. Inadvertently, like Yard, NOW had come to espouse abortion as a central concern and precisely on the terms that its judicial trajectory had set, not merely as a reaction but as a matter of principle. Freedom was choice. By 1991, chapters could order NOW chocolate logos (in mint, milk, and white chocolate) to sell "for women's lives."²⁶¹

Reproductive rights and abortion would define the early 1990s, not just as intermittent sideshows but as the central struggle of NOW both in litigation and broader advocacy.²⁶² Figure 3 shows the number of cases as

²⁵⁷ Molly Yard welcomed NOW's membership to the organization's National Conference by remarking "[a]nother year has passed since our last Conference and we are still waiting for childcare, medical leave, pay equity legislation in Congress" and immediately followed with "[a]nd we await again for a Supreme Court decision on abortion rights" implicitly positioning abortion and everything else (legislation proposals) at the same level. NAT'L ORG. FOR WOMEN, NO TURNING BACK!: THE 1990 CONFERENCE PROGRAM BOOK 1 (1990) (on file with Schlesinger Library, MC 496, Box 21, F.17).

²⁵⁸ NAT'L ORG. FOR WOMEN, EMPOWERING WOMEN: THE 1991 CONFERENCE PROGRAM BOOK 1 (1991) (on file with Schlesinger Library, MC 496, Box 21, F.18).

²⁵⁹ NAT'L ORG. FOR WOMEN, THE 1989 CONFERENCE PROGRAM BOOK, *supra* note 253 ("With the Court's agreement to do so, gone were our plans for the ERA March mandated by the '88 Conference.").

²⁶⁰ NAT'L ORG. FOR WOMEN, NO TURNING BACK!: THE 1990 CONFERENCE PROGRAM BOOK, *supra* note 257; NAT'L ORG. FOR WOMEN, EMPOWERING WOMEN: THE 1991 CONFERENCE PROGRAM BOOK, *supra* note 258.

²⁶¹ Nat'l Org. for Women, Chocolate for Women's Lives Order Form (on file with Schlesinger Library, MC 496, Box 21, F.18) ("Your chapter can reap the benefits of activists eating by selling . . . [c]hocolate for Women's Lives.").

²⁶² Not only did the number of abortion cases remain high, but abortion was also featured in news and articles. *See, e.g.*, NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1988 ANNUAL REPORT (1988), *supra* note 252; NAT'L ORG. FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1990 ANNUAL REPORT (1990), *supra* note 257; NAT'L ORG. FOR

listed in the 1990 NOW LDEF Report, by subject.²⁶³ Reproductive Rights was the category with the highest number of cases (20), closely followed by Employment Discrimination (18), and further below was Domestic Violence (8).

WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1993 ANNUAL REPORT (1993) (on file with Schlesinger Library, MC 623, Box 348, F. 13); NAT'L ORG. FOR WOMEN, WOMEN'S VISION, VOICES, VOTES: THE FEMINIZATION OF POWER, *supra* note 252; NAT'L ORG. FOR WOMEN, THE 1989 NATIONAL CONFERENCE PROGRAM BOOK, *supra* note 253; NAT'L ORG. FOR WOMEN, NO TURNING BACK!: THE 1990 CONFERENCE PROGRAM BOOK, *supra* note 257; NAT'L ORG. FOR WOMEN, EMPOWERING WOMEN: THE 1991 CONFERENCE PROGRAM BOOK, *supra* note 258; NAT'L ORG. FOR WOMEN, THE 1992 NATIONAL CONFERENCE PROGRAM BOOK (1992) (on file with Schlesinger Library, MC 496, Box 21, F. 19); NAT'L ORG. FOR WOMEN, EVERYDAY WOMEN EXTRAORDINARY ACTS: THE 1993 NATIONAL CONFERENCE PROGRAM BOOK (1993) (on file with Schlesinger Library, MC 496, Box 21, F. 20).

²⁶³ The report included in its cover a list of the court cases the organization was involved in, classified by subject area. Because the list included the name of the cases as well as the area under which NOW classified them, those accounted for in two categories (mostly constitutional law and reproductive rights) could be easily spotted. Thus, in the graph I have not included—as the report does—under “constitutional law” the cases that were also included under reproductive rights. Without that adjustment, constitutional cases would be as numerous as reproductive rights ones, but that figure underestimates the importance of reproductive rights by counting many of the reproductive rights cases also as part of the constitutional law group. *See* NAT'L ORG FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1990 ANNUAL REPORT, *supra* note 257.

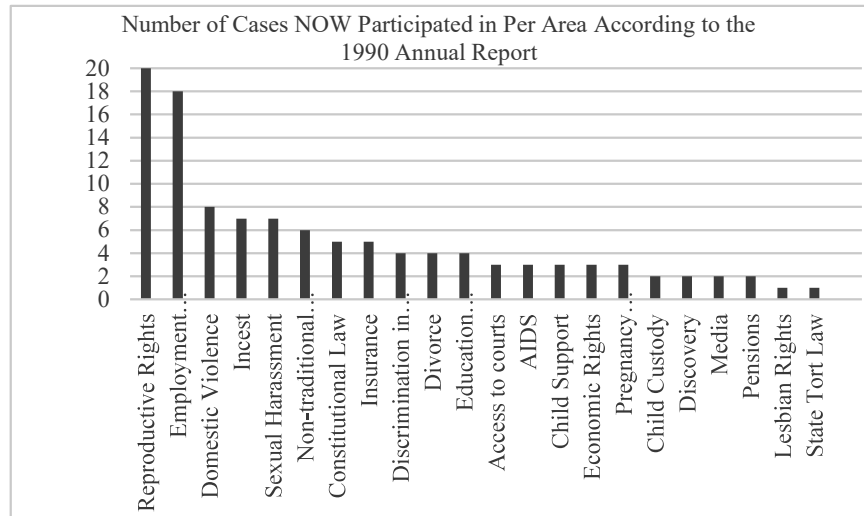


Figure 3. A breakdown of the types of cases that NOW LDEF participated in according to the NOW LDEF 1990 Annual Report.²⁶⁴

Reproductive rights' protagonism in the caseload appears even more interesting if considered against the fund's declared priority: economic justice. Economic inequality manifests in abortion access as well, but the booklet did not portray abortion as an economic issue.²⁶⁵ For example, in

²⁶⁴ *Id.*

²⁶⁵ I am not arguing that abortion is per se a sexual and non-economic issue, but that at this point activists treated it that way by classifying it as distinct from economic rights. The distinction between economic and sexual injustice is in many respects misleading as it obscures the significant ways in which sexual and economic politics are intertwined. This connection

1990, litigation represented by far the fund's highest expenditure.²⁶⁶ Among that litigation, only three of LDEF's cases were about economic rights.²⁶⁷ Thus, squaring the report's declaration that "NOW LDEF has always viewed the advancement of economic justice for women as the cornerstone of equality"²⁶⁸ with the fund's material actions seems problematic. But the translation becomes less challenging once one understands that, in fact, economic justice *had* been the cornerstone of equality for the fund. It just wasn't anymore.²⁶⁹ In other words, the functional connection between NOW's demands dissolved.

The organization's press release after that year's election stated that "NOW President Molly Yard expressed jubilation at the major victories for women candidates and abortion rights in yesterday's elections She credited the abortion issue with inspiring more women to run for office and more women to vote for abortion rights candidates."²⁷⁰ By 1990, abortion was not just an issue but a constitutive aspect of women's full participation—

was overtly manifest in activists' earlier actions, throughout what I have referred to as *feminist freedom* (in which activists questioned the institutions that relegated women to the roles and spaces society had already defined for them and strove to change them). *See supra* Part I. Were self-health practices better defined as sexual or economic? I would argue both, or neither, inasmuch as the questioning of medical gynecological knowledge and practices, for instance, contemplated both, or something different. The often spurious separation between economic and sexual politics corresponds to that between politics of redistribution and one of recognition. What sociologist Melinda Cooper wrote on a different context applies to our case as well. *See* COOPER, *supra* note 211 (describing the rise of the New Right, and the alliance of neoliberals and neoconservatives within it). She argued that "the distinction between recognition and redistribution proves unhelpful as a way of understanding the actual imbrication of sexual and economic politics" and that "the history of economic formations cannot be prized apart from the operations of gender, race, and sexuality without obscuring the politics of wealth and income distribution itself." *Id.* at 23–24. Similarly, neither of the demands activists struggled for can be pried from each other nor from the operations of the material context in which they appeared. The demands of the notorious 1970s Women's Strike for Equality elegantly illustrates this point. *See supra* note 70 and accompanying text. Considered together, and not as discrete and independent issues, the demands for abortion, no forced sterilization, free 24-hour daycare, and equal employment and education, embody a transformational agenda concerned with all aspects of society. *Id.*

²⁶⁶ *See* Figure 2.

²⁶⁷ NAT'L ORG FOR WOMEN, NOW LEGAL DEFENSE AND ACTION FUND 1990 ANNUAL REPORT, *supra* note 257.

²⁶⁸ *Id.* at i. The report offered an overview of NOW LDEF's "Twenty Years Toward Justice," describing the organization's activities and projects in six areas: workplace issues, economic supports, education, family law, reproductive choice, and court reform. *Id.*

²⁶⁹ Admittedly, employment issues never fully left the organization. If we consider employment discrimination and non-traditional employment for women cases as part of the same category (though NOW LDEF did not), the total number of employment cases in 1990 amounted to 24, a number 25% higher than reproductive rights. *See supra* Figure 3. In any case, the ways in which employment and abortion issues were conceived had drastically changed.

²⁷⁰ Press Release, Nat'l Org. for Women, Molly Yard Jubilant Over Election Results—Despite Obstacles, Women and Abortion Rights Win (Nov. 7, 1990) (on file with Schlesinger Library, MC 496, Carton 200, F. 37).

if not the full extent of it—for NOW's imaginary. The other issues that had once populated NOW's legal imagination had left the scene and remained as ancillary demands, disconnected from the core of women's struggle for equal citizenship. The 1990s press releases were significantly more focused on abortion than any other subject.²⁷¹

The turn towards abortion can also be appreciated in the prominent role it attained in NOW's National conference booklets. For its twentieth anniversary conference in 1986, for the first time, the cover of the booklet featured a picture related to abortion: an image of the first March for Women's Lives that had been organized by NOW earlier that year.²⁷² From that year on, abortion activism would routinely feature in such publications, making it to the cover on numerous occasions.²⁷³ The multi-layered and thematically varied stances that had featured in the organization's previous conferences were thus replaced by abortion, as a matter of rights. As shown

²⁷¹ The press releases included concerns over the defense of abortion clinics, opposition to anti-abortion extremists, NOW's lawsuits against Operation Rescue, Project Stand Up for Women NOW ("an international program coordinated by the National Organization for Women to assure women's access to abortion and to shut down Operation Rescue"), protest to parental consent requirements for abortion, NOW's "Do or Die Day" campaign to stop the confirmation of Supreme Court nominee David Souter who would regress women's rights. See Press Release, Nat'l Org. for Women, First National Abortion Clinic Defense Conference Celebrates Legal Victories, Braces for Continued Increase in Anti-Abortion Violence (Oct. 19, 1990) (on file with Schlesinger Library, MC 496, Carton 200, F. 37); Press Release, Nat'l Org. for Women, NOW Declares State of Emergency, Launches Major Lobbying Drive and Demonstration to Stop Souter (Sept. 18, 1990) (on file Schlesinger Library, MC 496, Carton 200, F. 37); Press Release, Nat'l Org. for Women, Project Stand Up For Women NOW (1990) (on file with Schlesinger Library, MC 496, Carton 200, F. 37); Press Release, Nat'l Org. for Women, Operation Rescue (1990) (on file with Schlesinger Library, MC 496, Carton 200, F. 37); Press Release, Nat'l Org. for Women, Yard Calls on Students to Fight for Their Rights at State and Federal Level (June 1990) (on file with Schlesinger Library, MC 496, Carton 200, F. 37).

²⁷² See NAT'L ORG. FOR WOMEN, NOW 20TH ANNIVERSARY NATIONAL CONFERENCE (1986) (on file with Schlesinger Library, MC 496, Box 21, F. 13).

²⁷³ Abortion rallies were the sole protagonists of the conferences' covers in 1989, 1990, 1992, 1994, 1995. See NAT'L ORG. FOR WOMEN, THE 1989 NATIONAL CONFERENCE PROGRAM BOOK, *supra* note 253; NAT'L ORG. FOR WOMEN, NO TURNING BACK!: THE 1990 CONFERENCE PROGRAM BOOK, *supra* note 261; NAT'L ORG. FOR WOMEN, THE 1992 NATIONAL CONFERENCE PROGRAM BOOK, *supra* note 266; NAT'L ORG. FOR WOMEN, THE 1994 NATIONAL CONFERENCE PROGRAM BOOK (on file with Schlesinger Library, MC 496, Box 200, F. 21); NAT'L ORG. FOR WOMEN, THE 1995 NATIONAL CONFERENCE PROGRAM BOOK (on file with Nat'l Org. for Women, MC 496, Box 200, F. 22). In 1996 and 1998, they featured ERA agitation, in addition to other pictures of the organization's history. See NAT'L ORG. FOR WOMEN, THE 30TH ANNIVERSARY NATIONAL CONFERENCE PROGRAM BOOK (1996) (on file with Schlesinger Library, MC 496, Box 200, F. 23); NAT'L ORG. FOR WOMEN, THE 1998 NATIONAL CONFERENCE PROGRAM BOOK (on file with Schlesinger Library, MC 496, Box 200, F. 24).

in Figure 4, the 1989 cover seemed particularly revealing of the new imaginary: it juxtaposed different international and national news coverage of abortion rallies. The pictures certainly responded to the violent attacks that anti-abortion extremists made against abortion providers.²⁷⁴ The cover's imagery, superimposing marches with peaceful protesters supporting abortion, women's lives, and choice, metaphorically confronted anti-abortion violence with peaceful and massive resistance. But the image also conveyed an indirect and more silent transformation: the new meaning of freedom. The different languages of the newspaper clippings represented on the collage hinted that, as seen by the international press, this was America. Even more, activists reclaimed this version of America as peaceful protesters resisting the conservative backlash. Opposing anti-abortion attacks and furthering women's choice was the paramount patriotic move. But the material, cultural, and historical circumstances surrounding that choice were occluded. Under the new focus, long gone were the days of *feminist freedom*. A few months after Reagan had finished his final term in the presidency, NOW's spotlight of choice disputed America's character. If inadvertently, the cover suggested America was (or could be) great again. Its greatness, in turn, depended on the nation's ability to secure the protection of the abstract woman's right to choose.

²⁷⁴ See NATIONAL ABORTION FEDERATION, 2015 VIOLENCE AND DISRUPTION STATISTICS: A DRAMATIC ESCALATION IN HATE SPEECH, THREATS, AND VIOLENCE 3 (2016), <http://prochoice.org/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf> [<https://perma.cc/YU7Z-764W>].



PRO-CHOICE: 'A SLEEPING GIANT' AWAKES
A Shift in tactics
They were angry, sure, like "Kopie" called on the "New York Times" and "Washington Post" for "pro-choice". But one of the

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NEVER AGAIN!

1989 National Conference
Cincinnati, Ohio - July 21-23, 1989

PRO-CHOICE

600,000 in pro-abortion march

NEVER AGAIN!

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1989 National Conference
Cincinnati, Ohio - July 21-23, 1989

Figure. 4. Cover and back of the NOW's National Conference 1989 booklet.

Abortion thus became the symbol of women's self-determination and liberty. The right to choose, the constitutionally secured right that belonged to a woman (not so much her doctor, at this point, nor a midwife), was the epitome of freedom, progress, and women's rights. The woman-chooser, thus, emerged as the ultimate focus of political discussion. Attacks on her ability to choose whether or not to carry a pregnancy to term became the overarching preoccupation of feminist activism in the American political imaginary. Even in feminist activists' political imagination, choice became the paramount proxy for women's freedom, as NOW's trajectory representatively shows.

Of course, many activists and groups continued to work on issues other than abortion. But the public discussion and main feature of publicly held debates over women's rights and gender roles overwhelmingly turned to abortion rights questions. Feminist organizations' anchor became the right to choose. The more encompassing alternatives, in that scenario, were those concerned not only with the legal availability of abortion but also with its material provision (thus extending the discussion over issues of funding). But even then, abortion and the rights framework remained central. When, in 1990, the National NOW Board decided to "declare a 'State of Emergency,' . . . to convince the Senate to reject [Souter's]" confirmation to the Supreme Court, what they conveyed was at stake was precisely women's freedom.²⁷⁵ The significance of this action cannot be overstated. The organization stressed that "NOW has not called a 'State of Emergency' since 1978, when almost all NOW resources were committed to the ERA extension campaign."²⁷⁶ Beneath Souter's confirmation pended women's rights, and while Yard warned generally that "abortion rights, equal protection and even the right to birth control [were] at stake,"²⁷⁷ The discussion and actions NOW led, such as the protest and lobbying on "Do or Die Day," revolved around abortion alone.²⁷⁸

The ERA's defeat and feminists' newfound single-issue strategy led to a condensation of what had been the women's movement's demands for *feminist freedom* into the paradigmatic (and single) demand for legal abortion. As the "Texas case" became unequivocally *Roe*, feminist aspirations followed. As *Roe* ceased to be *a* case and became *the* case, abortion ceased to be *a*

²⁷⁵ Press Release, Nat'l Org. for Women, NOW Declares State of Emergency, Launches Major Lobbying Drive and Demonstration to Stop Souter (Sept. 18, 1990) (on file with Schlesinger Library, MC 496, Carton 200, F. 37).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ See NAT'L ORG. FOR WOMEN, NOW 20TH ANNIVERSARY NATIONAL CONFERENCE, *supra* note 272.

demand and became *the* demand. Starkly absent from the new arrangement were projects aimed at the structural conditions that entrench gender discrimination. As the substantive discussion concentrated on abortion and courts, the terms of judicial disputes permeated NOW's legal imagination and their new utopia was structured around the right to choose. Thus rose *Roe feminism*.

V. CONCLUSION

The creation of the Reproductive Justice movement in 1994 blatantly exposed *Roe* feminism's shortages. Feminists of color, striving to move away from the my-body-my-choice reduction, proposed a human rights approach to reproductive justice, including the right not to bear children as well as the right to birth children in an adequate socio-economic environment. Still, even SisterSong's attempt to broaden the specific abortion question, to a general reproduction question, remained captive of the rights' compass — institutionally processed as judicially enforceable rights. Despite Reproductive Justice's efforts to the contrary, abortion continues to stand as a metonymy for feminism in public discourse.²⁷⁹ Further, as symbolically powerful as it is, abortion as a standalone demand remains incapable of defying the socio-political and economic structures that sustain women's oppression. The contemporary equation of feminist struggles and abortion rights misses an essential part of the story. A pernicious effect of the public obsession with *Roe* (and the decisions that followed) is that it occludes the historical contingency behind that equation. Confronted with the fact that a world in which American feminism existed without *Roe* and thrived, we can reclaim and creatively transform *feminist freedom's* legacy so that a capacious and all-encompassing feminist agenda can leave the fringes and make its way to the political mainstream in the United States.²⁸⁰

²⁷⁹ See generally *supra* notes 2 and 3, for a brief account of the origin of the reproductive justice framework and sample of groups that operate under it.

²⁸⁰ The “at least we gave you *Roe*” narrative ties 1960s and 1970s feminism to the abortion decision as the foremost concrete win of the movement. A representative formulation was published in *The Atlantic* in response to *Dobbs*' leak: “*We may have made a lot of mistakes, but at least we gave you Roe. I can’t even count the number of times my mother said some version of this to me. It was her way of explaining an earlier generation’s approach to feminism, and what she would say to me when she was trying to make sense of her own legacy.*” Molly Jong-Fast, *My Mother Was Wrong*, ATLANTIC (2022), <https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-overturn-abortion-peaceful-protest/629746> [https://perma.cc/DXM8-QRVM]. But that version of the story occludes the millions of smaller changes that took place in gendered forms of relations and, more importantly, women’s consciousness. Though these changes were in no way sufficient they offer a route and a form to strive for a non-patriarchal society.

In the United States more than anywhere else, the stakes of the abortion question were raised to the point of overriding the many other issues that continue to oppress women and sustain patriarchal structures. As *Roe feminism* rose, activists replaced freedom with choice. They did so by raising their investment in the judicial discussion, inadvertently carrying it beyond justices' chambers and into their political imaginary. Thus, "the war for freedom"²⁸¹ that NOW's President declared feminists were fighting in 1989 was nothing like the fight for *feminist freedom* of the past, but rather a war for choice (and a narrow one at that).

Almost 30 years after the rise of *Roe feminism*, an amici curiae by "154 distinguished economists" was presented to the court in *Dobbs*.²⁸² The brief wished to "correct[] the information before the Court" regarding the State of Mississippi's contention that "it is impossible to measure the impacts of abortion legalization and that abortion access is no longer relevant to women or their families."²⁸³ With the tools of causal inference, the brief argued "*Roe* is causally connected to women's advancements in social and economic life."²⁸⁴ Given the United States' virtually in-existent parental policies, among other structural conditions, the brief claimed that overturning *Roe* would disproportionately affect Black and poor women.²⁸⁵ It stated that "one common thread is that many of these women [who seek abortions] already face difficult financial circumstances. Approximately 49% . . . are poor, 75% are low income, [and] 59% already have children" and that said women also overwhelmingly lacked access to paid maternity leave or affordable childcare.²⁸⁶ As presented by the economists, the loss of abortion would mean the loss of freedom for Black and poor women. Undoubtedly, the outcome faced by women who cannot obtain the abortion they need is horrendous. In that sense, it is certainly true that abortion restrictions will disproportionately harm Black and poor women. Yet, such horror should not lead us to think then that lack of criminalization (and even access!) equals freedom. Having traced the American trajectory from *feminist freedom* to *Roe feminism*, one is left to wonder what it means to want an abortion in extremely unequal economic conditions.

The amici's aim was to evaluate abortion's impact on women's advancement, not women's freedom broadly conceived. Nor, by any means, does criminalization improve women's conditions, quite the contrary.

²⁸¹ NAT'L ORG. FOR WOMEN, THE 1989 CONFERENCE PROGRAM BOOK, *supra* note 253.

²⁸² Brief for Economists as Amici Curiae Supporting Respondents, *Dobbs v. Jackson's Women's Health Org.*, 142 S. Ct. 2228 (2021) (No. 19-1392).

²⁸³ *Id.* at 1.

²⁸⁴ *Id.* at 4.

²⁸⁵ *Id.* at 10, 18, 23.

²⁸⁶ *Id.* at 23–24.

However, the use of abortion as a lens to read more generally into women's condition in the United States is not only a formula used by economists but an apt metaphor for the discussion's current state.

The word "sex" was not once mentioned in the original text of the Constitution of the United States of America. Its only appearance arrived in the early twentieth century with the ratification of the Nineteenth Amendment.²⁸⁷ In retrospect, despite the historical particularities, it is hard to fathom that the Bill of Rights would ensure in the Second Amendment the right to bear arms more than a century before the text would incorporate a mention of women (through sex).²⁸⁸ It is no wonder then that in an unbelievably arid constitutional terrain for feminist aspirations, until recently, *Roe* stood as the paradigmatic federal recognition of women's fundamental autonomy in the American imaginary. Still, *Roe's* short-lived half-century brought with it not only constitutional hope but, inadvertently, a particular way of framing feminist aspirations, as matters of rights, and more importantly judicially enforceable entitlements and choice. Against the hopelessness brought by *Dobbs's* curtailment of pregnant people's basic constitutional rights, I hope this story can bring a tint of hope. This is not a call to return to the past, which has ceased to inhabit us—and for good reasons—but one to rediscover the contingency behind America's mainstream discussions about feminism and its hidden possibilities. Feminism without *Roe* is possible and, in fact, exciting.

²⁸⁷ See U.S. CONST. amend. XIX.

²⁸⁸ The Nineteenth Amendment was ratified in 1920 formally giving women the right vote (though many Black women were excluded through the infamous literacy tests and grandfather clauses that expanded throughout the South). See U.S. CONST. amend. XIX; see generally J. W. Sumers, *The Grandfather Clause*, 7 LAWYER BANK. SOUTH. BENCH BAR REV. 39 (1914), for a legal analysis of the grandfather clauses at the time of their passing. The first self-governing country or colony to grant the vote to all adult women was New Zealand in 1893. World Suffrage Timeline, <https://nzhistory.govt.nz/politics/womens-suffrage/world-suffrage-timeline> [<https://perma.cc/5TUX-RCGE>]. See Ministry for Culture and Heritage New Zealand, *World Suffrage Timeline*, <https://nzhistory.govt.nz/politics/womens-suffrage/world-suffrage-timeline> [<https://perma.cc/17NH-3KGV>], for a timeline of the earliest countries and colonies to give women the vote.