

# Reproducing Rights: Reconsidering the Costs of Constitutional Discourse

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**ABSTRACT:** Scholars critical of the constitutionalization of American politics use the history of struggles over reproductive health to illuminate the costs of constitutional discourse. This Article reconsiders the costs of constitutional discourse from the inside out, unearthing the history of how members of the pro-choice movement debated, revised, criticized, and ultimately embraced what many activists consciously saw as a limiting constitutional framework.

Studying activists' own debates about rights-claiming offers a new dimension to studies of the dominance and costs of constitutional discourse. On the one hand, the materials gathered here demonstrate the flexibility and capaciousness of rights arguments. Contrary to what some commentators have asserted, the history of the struggle for reproductive health strengthens rather than weakens the case for the fluidity and adaptability of constitutional rhetoric.

On the other hand, although many shared an awareness of the drawbacks of constitutional language, movement leaders sometimes marginalized those who challenged a rights-centered approach. Constitutional discourse attracted movement members independently of the influence of lawyers or litigators. Indeed, many movement leaders committed more to the language of rights at a time when activists had lost faith in the courts. The history of the movement suggests that the pull of constitutional discourse may be greater—and less tethered to the courts—than some studies have made plain.

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## INTRODUCTION

Scholars critical of the constitutionalization of American politics use the history of struggles over reproductive health to illuminate the costs of “cast[ing] political views and values in the framework of constitutional argument.”<sup>1</sup> Diagnoses of the problems with constitutional culture are far-ranging. Some suggest that when the courts transform an issue into a matter of constitutional law, ordinary people feel disenfranchised and contribute less often to debate on a substantive legal or political issue.<sup>2</sup> Others question whether constitutional reasoning can capture the full range of demands for social change that movements make: when activists adopt the rhetoric of a court decision, they may be constrained in demanding certain forms of social justice.<sup>3</sup>

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1. Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1466 (2006).

2. Some scholars favor “weak judicial review” as an alternative to judicial supremacy, allowing more room for popular engagement and influence. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 249-53 (2004); Mark Tushnet, *The Relation Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2249, 2249-50 (2013); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1354 (2006) (stating that the target of his objection is strong-form, not weak-form, judicial review). Other commentators view social-movement dialogue as a mediating influence on courts otherwise indifferent to popular views. See, e.g., Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006) (presenting a classic study of the power of social movement activity to produce and to alter regnant constitutional interpretations).

3. For studies questioning the value of constitutional discourse, see, for example, LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* 5 (2012), asking Americans to consider why they should not “systematically ignore the Constitution”; Frank I. Michelman, *Why Not Just Say No? An*

For many scholars, the history of reproductive rights offers a particularly potent example of what can go wrong when a Court treats a question as a matter of constitutional rights. Pointing to *Roe v. Wade*, commentators suggest that when a court defines a broad constitutional right, a judicial decision triggers a backlash that sets back the cause a court embraces.<sup>4</sup> Looking at abortion and a variety of other case studies, other scholars highlight how winning a constitutional right can convince social movement members to play up arguments related to that victory, downplaying other core demands for change or alternative, potentially effective arguments.<sup>5</sup> Still other commentators emphasize that rights claims focus grassroots activists on the interests of individuals rather than those of the larger community, convincing movements to set aside strategies that aid entire communities rather than their individual members.<sup>6</sup>

The scholarly literature tells a cautionary tale about social movements intent on winning or preserving constitutional rights. Such a victory can prove to be hollow or worse, intensifying opposition to a cause. By focusing on constitutional rights, movements may also marginalize the radical members who imbue a cause with the energy and the principled arguments that make social change possible.

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*Essay on the Obduracy of Constitution Fixation*, 94 B.U. L. REV. 1141 (2014); and Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 244-46 (1993), suggesting that “the Constitution itself is part of the problem, that constitutional constraints are themselves in some way incompatible with the pursuit of right and justice,” and that “the value of constitutionalism itself” is accordingly up for serious reconsideration.

4. See, e.g., MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE*, at x (2013) (“When the Court intervenes to defend a minority position or even to resolve an issue that divides the country down the middle, its decisions can generate political backlash . . . .”); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 415-19 (2d ed. 2008); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 80-81 (2013) (summarizing the scholarship of those concluding that “judgments challenging customary understandings [...] might even set back the cause because of the backlash they provoke”).

5. See, e.g., Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74-76 (2011); Risa L. Goluboff, “*We Live in a Free House Such as It Is*”: *Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 2015-17 (2003); see also Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1445 (2005) (arguing the undesirability of having the main focus of the social movement be the court battle).

6. See, e.g., JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* 1 (2013) (“In recent years, communitarian, civic republican, and progressive thinkers and politicians have argued that our constitutional system takes individual rights too seriously, to the neglect of responsibilities, virtues, and the common good.”); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 48 (1991) (“No aspect of American rights discourse more tellingly illustrates the isolated character of the rights-bearer than our protean right of privacy.”); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 11 (2d ed. 1998) (“The priority of the subject can only mean the priority of the individual, thus biasing the conception in favor of individualistic values familiar to the liberal tradition.”); Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893 (2014) (contending that the problem with American constitutional rights talk lies not with the very idea of rights, but rather with the emergence of “exit” rights as the dominant form of constitutional rights, and the correlative suppression from that category of “rights to enter” or “civil” rights).

This Article reconsiders the downsides of efforts to win new constitutional rights by exploring a lost chapter in the history of the pro-choice movement, a story many view as the prime example of what goes wrong when a movement succeeds in the courts. The Article unearths the history of how members of the pro-choice movement debated, revised, criticized, and ultimately embraced what many activists consciously saw as a limiting constitutional framework.

Starting in the 1980s, when the support of the Supreme Court for *Roe* seemed in doubt, movement members began an intense debate about how—and whether—to emphasize reproductive rights.<sup>7</sup> When the Supreme Court seemed poised to overrule *Roe* and leave rights without protection in *Webster v. Reproductive Health Services*,<sup>8</sup> the National Abortion Rights Action League (NARAL) urged its members to stop relying on the courts.<sup>9</sup> Instead of abandoning rights rhetoric altogether, NARAL defined rights as just one more political tool.<sup>10</sup> In this view, the courts were political actors, and abortion rights were only as strong as the number of voters and politicians willing to back it.

Rejecting reliance on the courts or on black letter law, others insisted that constitutional protections emerged and took meaning from grassroots, direct action protest, not the courts or other policymakers. In the late 1980s, antiabortion protestors in organizations like Operation Rescue mounted major blockades.<sup>11</sup> Leaders of the National Organization for Women (NOW) came to believe that a more principled form of civil disobedience was necessary to protect abortion rights.<sup>12</sup> Dissatisfied with the lobbying and electoral strategy prioritized by NARAL, NOW members believed that only direct-action protest could shore up the rights that *Roe* recognized.<sup>13</sup>

Still others, particularly abortion providers, maintained that reliance on the idea of rights, however defined, hobbled any effort to create a more just reproductive health care system. Organizing groups like the National Coalition of Abortion Providers (NCAP), providers working in the early 1990s illuminated what they saw as a disconnect between the rights-based rhetoric

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7. A word about terminology is in order here. The Article uses the term “reproductive health” to refer to access to obstetric and gynecological services, including contraception and abortion. By contrast, the Article uses the term “reproductive rights” to describe arguments and strategies predicated on constitutional protections. Finally, the Article uses the term “reproductive justice” to describe an approach focused not only on legal protections and individual choice but also on the racial, economic, social, and cultural constraints that limit women’s ability to make certain decisions.

8. 492 U.S. 490 (1989).

9. See *infra* Part I.

10. *Id.*

11. On the history of Operation Rescue and rise of clinic blockades, see, for example, GRACE ELIZABETH HALE, *A NATION OF OUTSIDERS: HOW THE WHITE MIDDLE CLASS FELL IN LOVE WITH REBELLION IN POSTWAR AMERICA* 270-83 (2011); ROBERT WUTHNOW, *RED STATE RELIGION: FAITH AND POLITICS IN AMERICA’S HEARTLAND* 288-319 (2011); and Faye Ginsburg, *Rescuing the Nation: Operation Rescue and the Rise of Antiabortion Militance*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000*, at 227, 227-51 (Rickie Solinger ed., 1998).

12. See *infra* Part II.

13. *Id.*

used by the pro-choice movement and the reality of practice in American clinics. In particular, providers concluded the idea of a right to abortion did not capture the full range of concerns voiced by women who terminated a pregnancy.<sup>14</sup> To guarantee meaningful access to abortion, providers wanted to stop stigmatizing abortion and discuss it in a way that spoke the experiences of more American women.<sup>15</sup>

Studying activists' debates about the value of rights-claiming adds a new dimension to studies of the dominance and costs of constitutional discourse. On the one hand, the materials gathered here demonstrate the flexibility and capaciousness of rights arguments. Contrary to what some commentators have asserted, the history of the struggle for reproductive health strengthens the case for the fluidity and adaptability of constitutional rhetoric. While the movement appeared fixated on the language of rights, this apparent consensus concealed contests about the meaning, value, and nature of rights.

On the other hand, although many shared an awareness of the drawbacks of constitutional language, those who challenged a rights-centered approach sometimes found themselves marginalized in the larger pro-choice movement. Constitutional discourse attracted movement members independently of the influence of lawyers or litigators. Indeed, many movement leaders committed more to the language of rights at a time when activists had lost faith in the courts. The history of the movement suggests that the pull of constitutional discourse may be greater—and less tethered to the courts—than some studies have made plain.

The Article proceeds in five parts. Part I sets the stage for battles about the use of constitutional discourse, detailing activists' disillusionment with court-centered strategies in the 1980s and 1990s. As this Part shows, leading movement organizations anxious about the judiciary did not reject constitutional rhetoric; far from it. Part I focuses on the work of NARAL, a group founded in 1969 to advocate for the legalization of abortion.<sup>16</sup> After 1973, NARAL continued to focus on keeping abortion legal and acceptable, although the organization also broadened its focus to include sex education, birth control, and health care for women and children.<sup>17</sup> As the courts retreated from protecting abortion rights, NARAL shifted focus, working primarily to protect legal abortion in Congress and the courts. However, NARAL did more than simply adopt new tactics. In adopting this strategy, NARAL members also

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14. See *infra* Part III.

15. *Id.*

16. On the founding and original goals of NARAL, see, for example, SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 18-24, 51-52 (1991); and MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 102-05 (2015).

17. NARAL currently emphasizes its focus on a full range of reproductive services. See, e.g., NARAL Pro-Choice America Mission Statement (July 20, 2015), <http://www.prochoiceamerica.org/about-us/mission-statements.html>.

described rights in different terms. While many in the organization still believed that the Constitution did protect abortion, leaders argued that in practical terms, rights depended entirely on the will of politicians and voters. To protect the right to choose, NARAL had to frame it in a way that resonated with the public. Enforcement of women's rights, the group's leaders argued, relied on the public, not the Constitution or the courts.

Part II studies an alternative idea about the enforcement of rights. Particularly within NOW, feminists insisted that politics offered a hope as false as the one some had seen in the courts. First organized in 1966, NOW took on a broad reform agenda designed to guarantee sex equality.<sup>18</sup> While NOW leaders began working on the abortion issue in 1968, the organization always pursued a broader agenda.<sup>19</sup> While NOW worked with NARAL in the political arena, leaders of the former began arguing that women could not depend on politicians or voters to enforce their rights. Members of NOW increasingly believed that feminists had secured abortion rights only engaging in civil disobedience. According to this view, women and providers could enforce their own rights by ensuring that the procedure remained available whatever the state of the black letter law.

Part III lays bare the tradeoffs involved in the movement's reinvention of rights. Convinced that constitutional discourse had crowded out valuable arguments, as this Part shows, mobilized providers tried to chart a new course for the movement. This part focuses on debates within two provider organizations, the National Abortion Federation (NAF) and the National Coalition of Abortion Providers (NCAP). Founded in 1977, NAF served as a source of support, training, and political advocacy for providers.<sup>20</sup> Organized in 1990, NCAP primarily represented the interests of independent clinics sometimes marginalized in NAF, a group that also included Planned Parenthood and independent physicians.<sup>21</sup> In the mid-1990s, NCAP leaders began arguing that rights discourse hamstrung the movement, regardless of how activists conceptualized constitutional rights or developed novel arguments about how the movement could enforce those rights. NCAP leaders worried that rights discourse did nothing to address the reasons many women chose abortion. Worse, rights language did not capture the moral or emotional complexity of the abortion experience—something providers felt was crucial in justifying women's control of their reproductive lives. Ultimately, however, mainstream organizations rejected the change in direction providers proposed, choosing to preserve tenuous victories.

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18. On the founding and early priorities of NOW, see, for example, MARYANN BARASKO, *GOVERNING NOW: GRASSROOTS ACTIVISM IN THE NATIONAL ORGANIZATION FOR WOMEN 11-60* (2004); and ZIEGLER, *supra* note 16, at 110-15.

19. See *supra* note 18 and accompanying text.

20. For discussion of the founding of NAF, see *infra* Part III.

21. For discussion of the founding and early years of NCAP, see *infra* Part III.

Part IV places this history within the larger scholarly literature on both constitutional discourse and reproductive justice. The materials assembled here tell a contradictory story about the language of rights, showing how it can accommodate a wide variety of demands for change while constraining those who challenge it. Significantly, this history also illuminates the political contingency of scholars' and activists' contemporary turn to reproductive justice—a focus not only on legal access and individual choice but also on the racial, economic, social, and cultural constraints that shape women's decisions. Histories of the reproductive justice movement often begin in 1994, spotlighting its emergence in the context of international human rights. The Article tells a much longer story, showing how movement contests and political setbacks helped to change the fortunes of those invested in reproductive justice. The future of such claims may be as hard to predict.

### I. MAKING RIGHTS A PART OF ORDINARY POLITICS

NARAL, a leader in the pro-choice movement, began experimenting with different ideas about constitutional rights in the wake of stinging defeats in the courts. Earlier in the 1980s, members of the group worried that they had done too little to connect emotionally to an ambivalent public. By focusing on the right to choose, NARAL members wondered if they had done too little to explain why women actually terminated pregnancies. Similarly, by not explaining when abortion was justified, NARAL members had not challenged the stigma pro-lifers had long built around abortion. While assuming that the courts would still protect abortion rights, NARAL leaders developed a message that members hoped would strike a chord with women, particularly poor and non-white women often left out by mainstream activism. The organization asked women to publicly talk about their abortion experiences and to explain how access to abortion had improved their lives.

Later in the 1980s, when the Supreme Court seemed ready to overrule *Roe*, the organization reversed course, instead looking to Congress and state legislatures to protect abortion. However, NARAL did not simply change tactics. Members of the group also argued that enforcement of any constitutional guarantee depended at least partly on voters and politicians. As a result, NARAL leaders changed their rights-based arguments, focusing on efforts to maximize popular support and sway undecided legislators.

This Part begins by exploring the rhetorical strategies NARAL developed in the early 1980s when members were convinced that the courts were on their side. After the justices retreated from *Roe* in the mid-1980s, as the Part shows next, NARAL leaders developed a new idea of what rights really involved. Rather than looking to the courts, members argued that the political branches gradually gave meaning to the guarantees spelled out in the constitutional text.

As members increasingly accepted this definition of rights, the organization transformed its arguments and tactical approach.

*A. Assuming the Support of the Courts, NARAL Experiments with a Bolder Approach*

For more than a decade after the Supreme Court decided *Roe v. Wade* in 1973, few movement members had questioned the commitment of the judiciary to legal abortion.<sup>22</sup> Supporters of legal abortion recognized that there was no guarantee of success in the courts, since prior to 1989, the movement had suffered significant setbacks, particularly in the context of abortion funding.<sup>23</sup> In 1977, the Supreme Court decided a trio of cases, *Maher v. Roe*, *Poelker v. Doe*, and *Beal v. Doe*, that paved the way for more state legislation banning the use of public dollars or facilities for abortion.<sup>24</sup> By 1980, in *Harris v. McRae*, the Court had upheld federal legislation outlawing most Medicaid funding for abortion.<sup>25</sup> Just the same, the Court had cast little doubt on the validity of the abortion right itself. For example, in 1983 in *City of Akron v. Akron Center for Reproductive Health*, a six-to-three majority struck down a multi-restriction statute many had seen as a model for antiabortion legislation.<sup>26</sup>

Activists believed that they could succeed if they could convince the public to support abortion as strongly as the courts. In 1985, NARAL members seeking to accomplish this goal promised to make women's experiences the center of the abortion debate.<sup>27</sup> An antiabortion film, *The Silent Scream*, sparked concerns that feminists had settled for a framework centered on physicians' prerogatives rather than women's needs.<sup>28</sup> Produced by Crusade for Life, an antiabortion group, the film narrated the suction abortion of a twelve-week old fetus.<sup>29</sup> With a voiceover by former NARAL leader Bernard

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22. On the movement's early reliance on the courts, see, for example, Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT ROE V. WADE SHOULD HAVE SAID: AMERICA'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 12 (Jack M. Balkin ed., 2005), explaining, "Reliance on the courts, in turn, diverted political energy away from forming a mass political movement for abortion rights"; and ROSENBERG, *supra* note 4, at 423, discussing how "In the abortion field, reliance on the Court seriously weakened the political efficacy of pro-choice forces."

23. See Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 *HARV. J.L. & GENDER* 285, 295 (2014).

24. See *Poelker v. Doe*, 432 U.S. 519, 520-21 (1977) (sustaining a ban on the use of St. Louis public hospitals for abortion); *Maher v. Roe*, 432 U.S. 464, 470-78 (1977) (upholding a Connecticut Medicaid funding ban on abortion); *Beal v. Doe*, 432 U.S. 438, 445-54 (1977) (upholding a Pennsylvania law that limited Medicaid funding for abortions).

25. *Harris v. McRae*, 448 U.S. 297 (1980).

26. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983).

27. For discussion of this effort, see, for example, WILLIAM SALETAN, *BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WARS* 37, 64-69, 79 (2004); and STAGGENBORG, *supra* note 16, at 128.

28. Part I, *infra*, later discusses these concerns.

29. See, e.g., L. Houston, "Silent Scream" Called "Testimony" for Pro-Life, *L.A. TIMES*, Feb. 13, 1985.

Nathanson, the film claimed to depict “a child’s mouth open in a silent scream”—“the reaction of a child imminently threatened with extinction.”<sup>30</sup>

While *The Silent Scream* traded in familiar pro-life images and arguments, the film attracted unprecedented attention, with screenings on high school and college campuses across the nation and an endorsement from President Ronald Reagan.<sup>31</sup> The waves made by the film convinced feminists of the need to focus less on the rights set forth in *Roe* and more on why women needed reproductive liberty. In a February letter to Judy Goldsmith, then president of the National Organization for Women (NOW), NARAL leader Nanette Falkenberg wondered how activists could overcome the “sense of powerlessness and frustration among our supporters and other pro-choice individuals.”<sup>32</sup> Falkenberg saw a fatal flaw in the way advocates had used rights—seeking to preserve them without fully explaining their justification. As Falkenberg explained, the movement could make progress only if it “recapture[d] the emotional side of the issue.”<sup>33</sup>

Rather than praising the abstract importance of choice, NARAL leaders launched *Silent No More*, a campaign designed to make a moral case for legal abortion. “We must *not* focus only on the hardship cases,” Falkenberg argued in 1985. “Those abortions are not the only ones that are justifiable or ‘right.’”<sup>34</sup> *Silent No More* specifically targeted poor women and women of color for whom abstract notions of choice and freedom rang hollow while tackling the moral questions often raised by abortion opponents.<sup>35</sup> As Falkenberg insisted: “We must begin to build a sense of the ‘morality’ of women needing to retain that right.”<sup>36</sup>

*Silent No More* promoted not only a new rhetorical strategy but also a broader vision of the movement’s reform agenda. In March 1985, the NARAL Foundation hosted a strategy weekend, inviting key litigators, activists, and consultants from a variety of reproductive-rights organizations.<sup>37</sup> Those present rejected a single-issue approach, instead calling for “real choices about having

30. D.Y. Johnson, “Graphic in the Extreme”: *Anti-Abortion Doctor Plans Follow-Up Film*, L.A. TIMES, Dec. 5, 1985, at 1; see also Stephen Champman, *Abortion and the Silent Scream*, CHI. TRIBUNE, Mar. 17, 1985, at 3.

31. See, e.g., Bertrand Marotte, *Group Will Use Film in Fight Over Abortion*, GLOBE & MAIL, Apr. 1, 1985, at 16.

32. Letter from Nanette Falkenberg to Judy Goldsmith (Feb. 1, 1985) (on file with Harvard University, Schlesinger Library, The NOW Papers, Box 8, Folder 1).

33. *Id.*

34. Letter from Nanette Falkenberg to NARAL Leadership, *Re: Action* (n.d., c. 1985) (on file with Harvard University, Schlesinger Library, The NARAL Pro-Choice Massachusetts Papers, Box 16, Folder 14).

35. See, e.g., Ziegler, *supra* note 23, at 302-05 (citing Memorandum, Impact of Focus on Women Strategy Weekend on “Silent No More,” (Apr. 29, 1985) (on file with Harvard University, Schlesinger Library, The NARAL Pro-Choice Massachusetts Papers, Box 16, Folder 14)).

36. Letter from Falkenberg to NARAL Leadership, *supra* note 34.

37. See NARAL Strategy Weekend: Summary of Second Session (n.d., c. 1985) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 185, Folder 6).

children,” including “real health care, including prenatal care; child care; supportive services (e.g. for [the]disabled); [and] education.”<sup>38</sup> Members of the group explicitly connected reproductive and sexual liberty by incorporating “seek[ing] and hav[ing] a right to seek sexual pleasure” in their vision as “a positive good.”<sup>39</sup> Nor did attendees want to conceal the moral and emotional nuances of abortion for many women. In de-stigmatizing the procedure, attendees hoped both to acknowledge the complexity of abortion and to convince the public that the “decision not to have kids is valued as a moral decision—[that] women are seen as moral agents.”<sup>40</sup> Activists hoped not only to “put the focus back on women’s lives, but also [to] use our polling and focus group information to capitalize on the messages that work best with different demographic groups.”<sup>41</sup>

When relying on the Supreme Court, activists had assumed that while the Constitution protected abortion rights, the public needed convincing. However, by the late 1980s, NARAL members no longer trusted the courts, and it seemed more than possible that the justices would overrule *Roe*. In *Thornburgh v. American College of Obstetricians and Gynecologists*, the majority in favor of preserving *Roe* had shrunk, with only five members of the court voting to strike down a challenged Pennsylvania law.<sup>42</sup> In 1987, when Justice Lewis F. Powell retired, the power of the president to reshape the Court seemed beyond question.<sup>43</sup> Although progressive activists defeated the nomination of Robert Bork, Ronald Reagan still selected Powell’s replacement.<sup>44</sup> The votes to overrule *Roe* seemed to have fallen into place.<sup>45</sup>

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38. *Id.* at 2.

39. *Id.*

40. *Id.*; see also Memorandum from Nanette Falkenberg, Executive Director, NARAL, to Members of the Media (Mar. 20, 1985) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 185, Folder 5).

41. NARAL Memorandum, *Overall Strategy: Capture the Climate/ Politicize/Polarize the Battle* (Nov. 17, 1988) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 204, Folder 16).

42. See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 749, 772 (1986).

43. For coverage of Justice Powell’s retirement, see, for example, Mike Kaszuba & Kate Parry, *Powell’s Retirement Turns Spotlight on Battle for Abortion*, STAR TRIB., June 27, 1987, at 8A; Walter V. Robinson, *Justice Powell Quits, Cites Ill Health*, BOS. GLOBE, June 27, 1987, at 1; and Glen Elsasser & Janet Cawley, *Powell Quits Supreme Court*, CHI. TRIB., June 27, 1987, at 1.

44. On Reagan’s effort to remake the Court, see, for example, BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS 394-95* (2000); JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR THE UNITED STATES SUPREME COURT 85* (2007); and THOMAS M. KECK, *THE MOST ACTIVIST COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 156-96* (2008).

45. Justice Anthony Kennedy, Powell’s replacement, would become the swing vote on abortion issues. See, e.g., Caitlin E. Borgmann, *Abortion, The Undue Burden Standard, and The Evisceration of Women’s Privacy*, 16 WM. & MARY J. WOMEN & L. 291, 311 (2010); Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J.L. & GENDER 377, 403 (2011). Although Kennedy joined a plurality in *Webster* upholding an antiabortion law, see *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 498-500 (1989), he helped to author the plurality in *Casey* upholding what the Court called the

B. *Questioning the Future in the Courts, NARAL Members Redefine Rights*

With the Court's support in question, activists committed to legal abortion began concluding that they had invested too much in protecting abortion rights through the courts. Under the leadership of Kate Michelman, NARAL had already reconsidered advocates' reliance on both litigation and constitutional discourse. A March 1987 strategy memorandum stressed that organizers would not be able to rely as heavily on the federal courts and would have to turn instead to Congress and state legislatures.<sup>46</sup> As the memorandum explained, depending on the courts had failed to distinguish NARAL from other pro-choice groups competing for recruits and dollars. Predicting an increase in competition for dollars and recruits within the pro-choice movement, the memorandum urged NARAL members to develop a strategy that would set the organization apart.<sup>47</sup>

NARAL's fresh focus on lobbying and ordinary politics prompted leaders of the group to rearticulate what reproductive rights were and who enforced them. Particularly when talking to external audiences, group members maintained that the Constitution and the courts protected a woman's right to choose abortion. On some occasions, NARAL leaders did tell voters and members of the public that they could effectively force the Supreme Court to preserve abortion rights. In internal discussions, however, NARAL leaders drew a more radical conclusion, suggesting that enforcement of that right depended on voters and their elected representatives. NARAL members argued that success in the courts depended almost entirely on political pressure. Viewing the courts as part of the political process, NARAL activists argued that the constitutional right to choose would have meaning only if the group could build popular support and win allies in Congress. Moreover, NARAL leaders argued that elected officials could themselves enforce rights as well as could the courts. If rights always were part of popular politics, NARAL leaders would discount any distinction between constitutional law and ordinary politics, presenting rights discourse as a tool for manipulating voters and politicians. Second, NARAL members retooled their vision of the Constitution to maximize popular support, describing legal abortion in terms the public would embrace.

Instead of setting aside constitutional discourse, NARAL leaders planned to "put an end to the perception that momentum is against us."<sup>48</sup> In November,

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"essential" holding of *Roe*. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 845-46 (1992) (plurality opinion). In the mid-1980s, however, NARAL leaders worried that any Justice replacing Powell would put abortion rights at risk. This Part next discusses the organization's response.

46. Ziegler, *supra* note 23, at 304-06.

47. *Id.*

48. Kate Michelman to NARAL Friends (Dec. 21, 1988) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 205, Folder 8). Earlier in 1988, NARAL had already begun emphasizing the idea of a pro-choice majority. See *Poll Reveals Continued Support*

in an internal conversation about tactics, NARAL leaders laid out a strategy for changing the course of the struggle. By “polariz[ing] the battle” and recapturing the way the public understood the issue, activists could create a majority that would force the Court to preserve legal abortion.<sup>49</sup> Mobilizing support for legal abortion meant “[c]reat[ing] a climate that makes it unacceptable to overturn *Roe v. Wade*.”<sup>50</sup> Although NARAL leaders still sought to preserve *Roe* in the courts, leaders of the group argued that the courts were part of, not removed from, ordinary politics. To win in court, NARAL would have to maximize popular support for its cause.

Making rights synonymous with public support would also help activists make the case in Congress for protecting legal abortion. Selling the idea of a pro-choice majority proved essential for activists convinced that the movement “need[ed] to . . . begin acting immediately as though our position is strengthened (not weakened) in this new [C]ongress.”<sup>51</sup> Without wins, as the memorandum explained, the movement could not “keep pro-choice morale up or [ . . . have] credibility with politicians.”<sup>52</sup> The only message a majority seemed to support involved a variation on the theme of privacy rights identified with the original *Roe* decision. While most Americans felt ambivalent about abortion, most voters understood “the absolutely compelling need to keep reproductive rights free from government intrusion.”<sup>53</sup>

Between 1988 and 1989, NARAL crafted a contradictory idea of rights—focusing on the constitutional significance of privacy while treating rights as the product of political pressure. In

December 1988, in seeking to create a uniform message for NARAL members, the affiliate development department circulated a pledge stating:

I believe deeply that our Constitution embodies the intensely personal and private right of a woman to decide when [ . . . ] to have children . . . or not to have children. I believe that this decision must be free of government intrusion.

I believe the U.S. Supreme Court correctly affirmed this principle 16 years ago in *Roe v. Wade* . . . .<sup>54</sup>

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for Choice, *NARAL News*, Spring 1988, at 1 (on file with Duke University, Bingham Library, The Takey Christ Papers, Box 23, NARAL News Folder).

49. NARAL Memorandum, *Overall Strategy*, *supra* note 41, at 1-2.

50. *Id.*

51. *Id.*

52. *Id.*

53. Kate Michelman to NARAL Friends, *supra* note 48, at 1-2.

54. “Pledge” Statement of Principle 1 (n.d., c. 1988) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 205, Folder 8); *see also* Kate Michelman to NARAL Friends, *supra* note 48, at 1-2 (describing the initiative to “activate the pro-choice majority,” in part by soliciting signatures for the pledge).

Emphasizing freedom from government interference promised to appeal to a wide variety of voters, particularly when NARAL members could tie their claims to a venerable constitutional tradition. At the same time, however, NARAL leaders asserted that rights depended almost entirely on the vagaries of ordinary politics. Rather than protecting reproductive freedom from popular majorities, NARAL would “create a climate in which it [was] unacceptable to erode or overrule *Roe*.”<sup>55</sup>

NARAL’s redefinition of rights continued in January 1989, when the Court granted certiorari in *Webster v. Reproductive Health Services*, a case addressing the constitutionality of a multi-restriction Missouri law.<sup>56</sup> By mobilizing a majority, NARAL leaders hoped not only to intimidate the Court but also to build support among voters and politicians convinced of the importance of selecting new justices. Creating and popularizing political protections would allow NARAL to “create a political climate in which it [was] unacceptable to erode or overrule *Roe*.”<sup>57</sup>

In the lead-up to and aftermath of *Webster*, NARAL’s *Who Decides* campaign revealed more about what it meant to define rights as a part of ordinary politics. In defining a “win,” an internal memorandum highlighted “evidence of numbers and potential power of pro-choice majority.”<sup>58</sup> If rights emerged from ordinary politics, NARAL would describe the Constitution only in terms that ambivalent citizens could embrace. As NARAL consultant Jackie Blumenthal explained in describing the group’s new rhetorical agenda: “The main thrust of the theme—‘you or them’—is a populist message designed to reach a broad cross-section of Americans.”<sup>59</sup>

Over the course of 1989, in defining rights as political, NARAL leaders further committed to only those substantive protections a majority supported. NARAL’s emphasis on politics partly resulted from the Court’s decision in *Webster*. While not overruling *Roe*, a divided plurality upheld much of a multi-

55. Memorandum, Affiliate Development Department to Affiliates 1-2 (Dec. 25, 1988), (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 205, Folder 8).

56. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

57. Letter from NARAL Affiliate Development Department to Affiliates (Dec. 23, 1988) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 204, Folder 8); see also Letter from Kate Michelman, Executive Director, NARAL, to Advocate Team Leader (Jan. 1989) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 208, Folder 5) (cover letter for an action packet to help advocates garner public support for abortion rights). For more on NARAL’s commitment to electoral politics, see Mary T. Schmich, *An Explosive Issue’s Leading Crusaders*, CHI. TRIB., July 24, 1989, at 1; *Abortion Rights League Launches Ad Campaign*, ST. PAUL PIONEER PRESS, May 31, 1989, at 2A; Jeffrey L. Rabin, *Money, Packaging*, L.A. TIMES, July 26, 1989, at 1.

58. NARAL Meeting Agenda (Mar. 8, 1989) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 208, Folder 9).

59. Letter from Jackie Blumenthal & Podesta Associates to Nikki Heidepriem 2 (Mar. 13, 1989) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 208, Folder 9); see also Memorandum from Hickman-Maslin Research Team to NARAL, *Re: Do’s and Don’ts* (Mar. 22, 1989) (on file with Harvard University, Schlesinger Library, The NARAL Papers, Accession II, Box 208, Folder 9).

part Missouri statute.<sup>60</sup> The most telling part of *Webster* involved a fetal-viability provision. Under this portion of the Missouri law, physicians had a duty to consider whether a pregnancy had reached the twentieth week or beyond.<sup>61</sup> If so, a provider had to make independent medical findings on fetal viability.<sup>62</sup>

The doctors and clinics challenging the law argued that it violated *Roe* by substituting the judgment of the government for the protected discretion of doctors. Writing for two other justices, Chief Justice William Rehnquist identified any conflict between the statute and the 1973 decision as evidence not that the Missouri law was flawed, but rather that *Roe* was “unsound in principle and unworkable in practice.”<sup>63</sup> Justice Antonin Scalia wrote separately to state more explicitly that the Court should overrule *Roe* altogether.<sup>64</sup> Having written skeptically about the trimester framework, Justice Sandra Day O’Connor did not join the plurality because she believed that the viability provision did not conflict with *Roe*, rendering reconsideration of the decision unnecessary.<sup>65</sup>

*Webster* intensified interest in a definition of rights reliant on popular majorities and ordinary politics. First, *Webster* dashed any remaining hope that the Court would protect abortion rights in the near term. “We would like for it not to be a political battle in every state, every community, every locale,” Michelman told the media in the aftermath of *Webster*, “but the court has given it over to political action.”<sup>66</sup> Second, *Webster* helped to mobilize supporters of legal abortion, allowing NARAL to engineer large-scale protests, campaign effectively in state and local elections, fend off some new restrictions in the states, and make a push for pro-choice legislation at the federal level.<sup>67</sup>

For NARAL, a federal solution seemed particularly compelling—a way to avoid the state-by-state struggle that seemed to only chip away at abortion rights.<sup>68</sup> In addition to considering a proposed constitutional amendment, NARAL focused on the Freedom of Choice Act (FOCA), a federal law that would codify the 1973 *Roe* decision.<sup>69</sup> As one activist explained, FOCA began

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60. See *Webster*, 492 U.S. at 514-18.

61. See *id.* at 513-16.

62. See *id.*

63. *Id.* at 518.

64. See *id.* at 532-37 (Scalia, J., concurring in part).

65. See *id.* at 522-32. (O’Connor, J., concurring in part).

66. Nene Foxhall, *Abortion Rights Group Targets Texas Races*, HOUS. CHRON., Sept. 12, 1989, at A27; see also Martha Shirk, *Abortion Rights Leader Vows Victory*, ST. LOUIS POST-DISPATCH, Nov. 10, 1989, at 4B (Michelman explaining that NARAL could no longer rely on the judiciary).

67. On NARAL’s post-*Webster* strategy, see, for example, Steve Berg, *Political Landscape on Abortion Issue Shifts*, STAR TRIB., Oct. 15, 1989, at 1A; Christine Bertelson, *Abortion-Rights Group Plan Education, Legislation Drive*, ST. LOUIS POST-DISPATCH, Dec. 31, 1989, at 6A; and Rob Karwath, *Abortion Rights Group Praises Edgar and Criticizes Hartigan*, CHI. TRIB., Aug. 23, 1989, at 8.

68. See, e.g., SALETAN, *supra* note 27, at 222; STAGGENBORG, *supra* note 16, at 141.

69. See, e.g., STAGGENBORG, *supra* note 16, at 141; William Saletan, *Electoral Politics and Abortion: Narrowing the Message*, in ABORTION WARS, *supra* note 11, at 111, 122.

as “a vehicle to energize and organize the grassroots,” “a tool for educating Congress and the public about the abortion issue in general.”<sup>70</sup>

FOCA represented a way out of a messy state-by-state fight that *Webster* inspired. Between 1989 and April 1991, seven states introduced new abortion restrictions, and 200 more bills were pending.<sup>71</sup> In July 1990, when Justice William Brennan, a consistent vote in favor of legal abortion, announced his retirement, pro-life groups seemed to enjoy an even stronger position.<sup>72</sup> When Justice Thurgood Marshall stepped down from the Court in the summer of 1991 and the Supreme Court agreed to hear another abortion case the following January, FOCA seemed to be the only way out of endless battles in the states.<sup>73</sup> Prepared for defeat in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>74</sup> the next challenge to *Roe* to arrive at the Court, Michelman and her colleagues at NARAL hoped to use what they foresaw as an inevitable setback to surpass the momentum for FOCA built after *Webster*. As Michelman explained in April, NARAL would remind politicians of the force of a supposed pro-choice majority, sending “a message to every office-holder and every office-seeker in America.”<sup>75</sup>

In 1992, when the Supreme Court decided *Casey*, FOCA seemed much more than a mobilizing tool for NARAL activists dedicated to political protections for abortion. Contrary to what many had expected, the Court preserved what the plurality called the “essential holding” of *Roe v. Wade*, declaring once again that the Constitution protected abortion.<sup>76</sup> However,

70. Letter from Ron Fitzsimmons to Peg Johnston, enclosed *Summary of Issues 1* (May 11, 1990) (on file with Duke University, Bingham Library, The Peg Johnston Papers, Box 1, NAF Feminist Caucus Folder).

71. See, e.g., Mimi Hall, *Abortion Fight Shifts Gears*, USA TODAY, Apr. 30, 1991, at 3A. For more on the push for new state laws, see Dan Balz & Ruth Marcus, *In Year Since Webster, Abortion Debate Defies Prediction*, WASH. POST July 3, 1990, <https://www.washingtonpost.com/archive/politics/1990/07/03/in-year-since-webster-abortion-debate-defies-predictions/b30df2ea-8ea8-4a3f-b29f-1f740df63760/>; Linda Feldmann, *States Stitching Patchwork Quilt of Abortion Laws*, CHRISTIAN SCI. MONITOR, Nov. 7, 1990, <http://www.csmonitor.com/1990/1107/aweb.html>; and Dawn M. Weyrich, *Pro-Lifers Seek New Tools in Old Laws*, WASH. TIMES, Nov. 24, 1989, at A4.

72. On Justice Brennan’s retirement, see, for example, Curtis J. Sitomer, *The Brennan Legacy*, CHRISTIAN SCI. MONITOR, Aug. 2, 1990, <http://www.csmonitor.com/1990/0802/dbren.html>; *Ailing Brennan, Key Liberal, Resigns from Court*, BOS. GLOBE, July 21, 1990, at 1; and *Justice Brennan Retires from the Court*, S.F. CHRON., July 21, 1990, at A1.

73. On Justice Marshall’s retirement, see, for example, Andrew Rosenthal, *Marshall Retires from High Court: Blow to Liberals*, N.Y. TIMES, June 28, 1991, at A1; Stephen Wermiel, *Conservatives Lock Up Control of Court After Marshall Retires*, WALL ST. J., June 28, 1991, at A1; and *Marshall Finalizes Court Retirement*, L.A. TIMES, Oct. 2, 1991, [http://articles.latimes.com/1991-10-02/news/mn-2810\\_1\\_marshall-retirement-court](http://articles.latimes.com/1991-10-02/news/mn-2810_1_marshall-retirement-court). For coverage of the threat posed by *Casey*, see Linda P. Campbell, *Abortion Rights: Pennsylvania Case Could Test Roe*, CHI. TRIB. Jan. 19, 1992, [http://articles.chicagotribune.com/1992-01-19/features/9201060308\\_1\\_spousal-notification-abortion-rights-groups-abortion-rights](http://articles.chicagotribune.com/1992-01-19/features/9201060308_1_spousal-notification-abortion-rights-groups-abortion-rights); *PA Case Could Soon Put Roe v. Wade in Jeopardy*, PHILA. INQUIRER, Jan. 3, 1992, at B3; and *Abortion Foes, Backers to Rally*, DALL. MORNING NEWS, Jan. 21, 1992, at 3A.

74. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

75. Joe Frolik, *Today’s Pro-Choice March Called Last Chance*, CLEV. PLAIN DEALER, Apr. 5, 1992, at A3.

76. *Casey*, 505 U.S. at 846.

*Casey* set aside the trimester framework, adopting a less rigorous undue burden test that seemed likely to lead to more rather than less regulation at the state level. Under *Casey*, a law violated the Constitution if it had “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>77</sup> Applying this test, *Casey* upheld all but one of the provisions of a challenged Pennsylvania law, convincing commentators that the Court had substantially undercut protections for abortion rights.<sup>78</sup> Given the Court’s apparent receptivity to state abortion regulations,<sup>79</sup> FOCA seemed to be the best way to preserve access to the procedure.<sup>80</sup>

After *Casey*, the fight for FOCA intensified, exposing deep disagreements within the movement about whether abortion rights should depend on ordinary politics. Two versions of the bill emerged in Congress, a Senate version with added restrictions and a House version without.<sup>81</sup> A majority seemed ready to pass a narrow version, but other supporters of legal abortion, particularly leaders of NOW, prevailed on members of Congress not to bring the bill up for a vote because it did too little to protect the abortion right.<sup>82</sup> In December, the idea of a political abortion right exposed a deeper division between NARAL and other organizations in favor of legal abortion.<sup>83</sup> The 1992 midterm elections secured a pro-choice majority in Congress, but disagreements within the movement intensified.<sup>84</sup>

FOCA continued to spark strife in 1993, when Congress again considered two competing versions of statutory abortion rights.<sup>85</sup> NARAL championed the Senate version—a moderate measure that would still create protections broader than those in *Casey*, allowing states to pass laws only on abortion funding,

77. *Id.* at 877. On the perception that *Casey* was less protective than *Roe*, see, for example, Julie Schragger, Letter to the Editor, *The Impact of Casey*, 1992 WIS. L. REV. 1331, 1331-32; Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein’s Analysis of Casey*, 45 HASTINGS L.J. 961, 966-67 (1994); *Another Blow Against Roe*, ST. LOUIS POST-DISPATCH, June 30, 1992, at 2B; Frances Kissling, *Pro-Choice Must Widen Its Agenda; Reproductive Rights Are in Peril, Not Just Abortion Rights*, L.A. TIMES (June 30, 1992), [http://articles.latimes.com/1992-06-30/local/me-1150\\_1\\_abortion-rights](http://articles.latimes.com/1992-06-30/local/me-1150_1_abortion-rights).

78. See *Casey*, 505 U.S. at 879-901.

79. See *id.*

80. On the perceived importance of FOCA as a source of protection for abortion, see Mary Crisp Dent, *A National Law on Abortion? Yes: It Is the Only Real Hope for Women’s Rights, Health, Lives*, ORLANDO SENTINEL (July 5, 1992), [http://articles.orlandosentinel.com/1992-07-05/news/9207020162\\_1\\_freedom-of-choice-choice-act-pass-the-freedom](http://articles.orlandosentinel.com/1992-07-05/news/9207020162_1_freedom-of-choice-choice-act-pass-the-freedom); James A. Finefrock, *Freedom of Choice*, SAN. FRAN. EXAMINER, July 29, 1992, at A16; *Court Expected to Launch Abortion Battle on Hill*, WASH. POST, June 26, 1992, at A4.

81. See, e.g., *Clean Abortion Bill Swept Aside*, DENVER ROCKY MOUNTAIN NEWS, Sept. 17, 1992, at 56.

82. See *id.*

83. See, e.g., Linda Feldmann, *New Congress May Find Little Agreement on Abortion Rights Bill*, CHRISTIAN SCI. MONITOR, Dec. 1, 1992, at 1.

84. See, e.g., *id.*

85. See, e.g., Elizabeth Ross, *Freedom of Choice Act Splits Activists in Pro-Choice Movement*, CHRISTIAN SCI. MONITOR (Apr. 9, 1993), <http://www.csmonitor.com/1993/0409/09022.html>; Alissa Rubin, *Abortion-Rights Bill Stalls as Pressure, Interest Wanes*, DENVER ROCKY MOUNTAIN NEWS, May 16, 1993, at 44A.

public facilities, and parental consultation.<sup>86</sup> NOW, among other organizations, favored the House version, a bill that made no exceptions beyond a narrow rule on conscientious objection.<sup>87</sup>

The division between the two sides arose partly because NOW leaders preferred a different approach to the enforcement of rights. To be sure, movement members could and did pursue a number of alternative strategies for preserving access to legal abortion. However, at times, NOW leaders questioned the value of protections that depended on elected officials. As NOW leader Patricia Ireland explained: “If we have to continue to fight [the abortion issue] in 50 state capitals, then I am not clear what the point is with moving ahead with the Freedom of Choice Act.”<sup>88</sup> By contrast, by defining rights as a part of ordinary politics, NARAL leaders happily settled for protections that could be gradually expanded and redefined. Kate Michelman of NARAL put the point bluntly: “Not to take advantage of this political climate would be [. . .] the ultimate strategic error.”<sup>89</sup>

By the summer of 1993, the campaign for FOCA had fallen apart. In July, Senator Carol Moseley-Braun (D-Ill.) withdrew her support for the bill, arguing that politically limited rights betrayed both poor women and the principles of the movement.<sup>90</sup> By September, supporters of the bill admitted that it was dead, indefinitely postponed while pro-choice activists pursued other goals.<sup>91</sup> Just the same, the rift revealed by the FOCA battle ran deeper. NOW leaders worked with NARAL on political campaigns to shore up abortion rights, but leaders of the organization often spotlighted an alternative strategy for defining and enforcing constitutional rights—one that relied on grassroots activism.

As Part II explores, the decisions of *Webster* and *Casey*, together with the mobilization of Operation Rescue and the expansion of clinic blockades and the fight for FOCA, encouraged NOW members to reconsider how women could enforce constitutional protections. Rather than relying on politicians or legal authorities, as NOW leaders argued, women would have a meaningful right only if providers and patients enforced it themselves.

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86. See Ross, *supra* note 85. On which version of FOCA NARAL supported, see William Freivogel, *Abortion Rights Allies at Odds*, ST. LOUIS POST-DISPATCH, July 18, 1993, at 1B.

87. See Ross, *supra* note 85.

88. *Id.*

89. Robin Toner, *Abortion-Rights Backers Reassess Strategy*, DALL. MORNING NEWS, Apr. 25, 1993, at 37A.

90. See Elaine S. Povich, *Abortion Rights Bill Rejected by Moseley-Braun*, CHI. TRIB. (July 10, 1993), [http://articles.chicagotribune.com/1993-07-10/news/9307100041\\_1\\_freedom-of-choice-act-abortion-rights-bill-sen-carol-moseley-braun; Sponsor of Pro-Choice Bill Withdraws Backing](http://articles.chicagotribune.com/1993-07-10/news/9307100041_1_freedom-of-choice-act-abortion-rights-bill-sen-carol-moseley-braun; Sponsor of Pro-Choice Bill Withdraws Backing), SAN. FRAN. CHRON., July 10, 1993, at A8.

91. See, e.g., *A Choice Impasse*, NEWSDAY, Sept. 20, 1993, at 20; Editorial, *Some Abortion Rights Progress*, ST. PETERSBURG TIMES, Sept. 20, 1993, at 8A.

## II. RIGHTS WITHOUT RELIANCE ON LEGAL AUTHORITY

While supporting core legislative initiatives like FOCA, NOW leaders forged a very different idea of rights, one centered on non-violent civil disobedience. NOW leaders embraced the same constitutional discourse that defined NARAL advocacy and often worked side by side with NARAL. At the same time, the idea of an abortion right articulated by NOW leaders accommodated radically different ideas about what rights were, who had the power to define them, and how they advanced social change. Frustrated by unreliable politicians and constant compromise, NOW members concluded that rights depended on neither Congress nor the courts. If providers were willing to perform abortions, and women continued to demand them, lawmakers would have to act, and women would have access to abortion rights.

This Part begins by exploring the root causes of NOW's effort to identify a new enforcement mechanism for reproductive rights. Next, in studying NOW's response to an uptick in antiabortion violence, this Part examines how organization leaders experimented with different ideas about rights in developing a uniquely feminist brand of civil disobedience. Group members ultimately concluded that courts and legislators recognized constitutional rights only as the end result of grassroots protest. As importantly, women and providers played a crucial role in the enforcement of rights, dictating whether women actually had access to reproductive health services.

*A. NOW Leaders Lose Faith in Existing Political and Legal Strategies*

NOW's disillusionment with the movement's political strategy was gradual. Members of the organization had voted to endorse abortion rights in 1967,<sup>92</sup> but prior to the mid-1980s, NOW had prioritized the Equal Rights Amendment (ERA), a measure that would have explicitly written sex equality into the federal Constitution.<sup>93</sup> By 1984, when efforts to resurrect the ERA had become primarily symbolic and abortion opponents had attacked several clinics, leaders of the group channeled more energy into the abortion struggle.<sup>94</sup> As early as 1985, NOW began to craft an alternative strategy for protecting

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92. On the NOW abortion endorsement, see, for example, GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 212 (2005); and MARC STEIN, *SEXUAL INJUSTICE: SUPREME COURT DECISIONS FROM GRISWOLD TO ROE* 116 (2010).

93. On NOW's prioritization of the ERA, see, for example, LINDA M. BLUM, *BETWEEN FEMINISM AND LABOR: THE SIGNIFICANCE OF THE COMPARATIVE WORTH MOVEMENT* 41 (1991); and William H. Chafe, *The Road to Equality: 1962 to Today*, in *NO SMALL COURAGE: A HISTORY OF WOMEN IN THE UNITED STATES* 544-45 (Nancy F. Cott ed., 2000).

94. On NOW's effort to counter abortion clinic violence, see, for example, Joyce Gemperlein, *NOW: Reagan Fueling Anti-Abortion Attacks*, PHILA. INQUIRER, Mar. 16, 1984, at A4. On the politics of the ERA in the 1980s, see Serena Mayeri, *A New E.R.A. or a New Era?: Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1230-40 (2009).

reproductive liberty. With the election of Eleanor Smeal as NOW President, the organization played down reliance on litigation and lobbying, reinvigorating the grassroots protests that had fueled the women's movement in the 1960s and 1970s.<sup>95</sup>

However, throughout the mid-1980s, under Smeal and her successor, Molly Yard, NOW mostly embraced the vision of rights set forth by the larger pro-choice coalition. During the ultimately failed nomination of Robert Bork to the Supreme Court, NOW leaders played a supporting role in the Block Bork Coalition, a progressive, cross-movement alliance that successfully discredited Reagan's nominee.<sup>96</sup> With the Court seemingly prepared to overrule *Roe*, NOW echoed NARAL's claims that politics could protect rights that the judiciary had abandoned.<sup>97</sup> As a NOW letter to members stated: "Attorneys believe that the cause of legal abortion must be taken to the people—that the people speaking with one loud voice is our best hope to protect this essential constitutional right."<sup>98</sup>

By the late 1980s, with the rise of Operation Rescue, NOW leaders began expressing frustration with politically centered rights. Antiabortion picketers had mobilized outside of clinics since the 1970s, but by the late 1980s, led by Binghamton, New York, native Randall Terry, protests expanded dramatically.<sup>99</sup> Together with a spike in antiabortion violence, the new blockades reinvigorated the pro-life movement, drawing in new members and attracting unprecedented media attention.<sup>100</sup> In the summer of 1988, an Atlanta, Georgia blockade of abortion clinics led to hundreds of arrests, flooding the courts.<sup>101</sup> Operation Rescue framed these blockades as "rescues," supposedly

95. See, e.g., Beverly Beyette, *NOW Election Means New Activist Course: ERA, Abortion Will Be at Center of Fresh Approach*, L.A. TIMES (July 22, 1985), [http://articles.latimes.com/1985-07-22/news/vw-6203\\_1\\_era-campaign](http://articles.latimes.com/1985-07-22/news/vw-6203_1_era-campaign); Betty Cuniberti, *NOW Chief Has Ambitious Plans in "Comeback" Bid*, L.A. TIMES, Sept. 9, 1985, at A18.

96. On NOW's opposition to the Bork nomination, see, for example, *Groups Hope to Block Bork*, MIAMI HERALD, Sept. 16, 1987, at 1; *New NOW Chief Rips Bork*, CHI. SUN TIMES, July 20, 1987, at 22; and Lorena Oropeza, *We Must Block Bork, NOW Members Decide*, ORLANDO SENTINEL, Aug. 10, 1987, at B2. On the effort to derail Bork's nomination, see Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759, 761 (1991).

97. See Mary Ziegler, *Ways to Change: A Reevaluation of Article V Campaigns and Legislative Constitutionalism*, 2009 BYU L. REV. 969, 1002 (discussing NOW's role in the effort to define political support as a reason to uphold *Roe*).

98. Letter from NOW to Chapter Presidents (Dec. 5, 1988) (on file with Harvard University, Schlesinger Library, The NOW Papers, Box 91, Folder 24); see also Memorandum from Pam Hughes to NOW Officers, *Re: Reproductive Rights Media Strategy Group* (Dec. 15, 1989) (on file with Harvard University, Schlesinger Library, The NOW Papers, Box 91, Folder 15).

99. See, e.g., ZIAD W. MUNSON, *THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS* 88-89 (2008); JAMES RISEN & JUDY L. THOMAS, *WRATH OF ANGELS: THE AMERICAN ABORTION WAR* 181-82, 258-61 (1998); DANIEL K. WILLIAMS, *GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 223-24 (2010).

100. On the history of Operation Rescue and rise of clinic blockades, see, for example, HALE, *supra* note 11, at 277-83; WUTHNOW, *supra* note 11, at 287-311; and Ginsburg, *supra* note 11, at 227-50.

101. See, e.g., Ronald Smothers, *Atlanta Protests Prove Magnet For Abortion Foes*, N.Y. TIMES (Aug. 13, 1988), <http://www.nytimes.com/1988/08/13/us/atlanta-protests-prove-magnet-for-abortion->

saving women and children by preventing women from entering a clinic on that day and perhaps dissuading them from terminating a pregnancy altogether.<sup>102</sup> With new blockades announced, NOW members joined with other pro-choice advocates to debate how best to defuse the threat posed by Operation Rescue.<sup>103</sup>

At a May 1989 strategy meeting, members of NOW, NARAL, Planned Parenthood, and other prominent organizations shared ideas about how to “seek injunctions [and] videotape protests [to] identify specific protestors.”<sup>104</sup> Blockades almost inevitably involved breaking local trespassing laws.<sup>105</sup> Pursuing trespass charges, the argument went, would create crushing financial burdens that would put at least some blockaders out of business.<sup>106</sup>

While using the courts, advocates also wanted to present blockaders as enemies of both the Constitution and the rule of law. Framing members of the opposition as outlaws promised to swing public opinion. Meeting participants planned to step up “‘negative’ advertising, defining the opposition as extremists.”<sup>107</sup> Operation Rescue leaders described blockades as acts of conscientious objection.<sup>108</sup> By invoking conventional understandings of the Constitution, movement leaders responded that rescues were illegal, anarchic, and contrary to the nation’s principles. The meeting advised those present not to “define Operation Rescue’s activities as civil disobedience,” since doing so “defines them as part of the civil rights movement.”<sup>109</sup> Instead “[s]ince the majority of the Operation Rescue leadership [were] men,” meeting attendees decided to “project the image of men trying to prevent women from exercising their rights.”<sup>110</sup> Defeating Operation Rescue would require movement leaders to “mobilize [coalition partners] to speak out against lawlessness.”<sup>111</sup>

However, given NOW’s investment in grassroots protest, the rise of Operation Rescue offered more complex lessons. Although critical of the way clinic blockaders conducted direct-action protest, NOW leaders learned from the apparent efficacy of antiabortion acts of civil disobedience. Feminists recognized that blockades had drawn unprecedented media attention, but the

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foes.html; David Treadwell, *Escalating Protests Turn Atlanta Into a Battleground*, L.A. TIMES (Aug. 13, 1988), [http://articles.latimes.com/1988-08-13/news/mn-168\\_1\\_abortion-clinics](http://articles.latimes.com/1988-08-13/news/mn-168_1_abortion-clinics).

102. See, e.g., Ginsburg, *supra* note 11, at 232; Susan Faludi, *Where Did Randy Go Wrong?*, MOTHER JONES, Nov. 1989, at 24; Peg Tyre, *Holy War: On the Abortion Front Lines with Operation Rescue*, N.Y. MAG., Apr. 24, 1989, at 48.

103. See, e.g., Operation Rescue Strategy Meeting Minutes (May 15, 1989) (on file with Duke University, Bingham Library, The Feminist Women’s Health Center Papers, Box 51, Operation Rescue Folder).

104. *Id.*

105. *See id.*

106. *See id.* at 3.

107. *Id.*

108. *See id.*

109. *Id.*

110. *Id.*

111. *Id.*

return of civil disobedience to the news also reminded NOW leaders of the power of street protests in the lead-up to *Roe*. The organization's members grew disillusioned with NARAL's approach to abortion rights, believing that politicians and voters would inevitably compromise on key issues and disappoint the American women who depended on them. Instead, NOW leaders insisted that women and abortion providers could best enforce abortion rights by refusing to obey unjust laws and guaranteeing themselves that women could still terminate pregnancies. To be sure, if the Court overruled *Roe*, NOW members planned protests large enough to match clinic blockades. However, the organization's leaders also urged providers to continue offering abortion services, regardless of what the Supreme Court held.<sup>112</sup> Women and providers who continued exercising abortion rights were the ones who could enforce abortion rights.

In December 1988, when the Court seemed ready to overrule *Roe*, NOW activists questioned the value of defending rights politically.<sup>113</sup> A letter to group members proposed that feminists could defend abortion rights not by trusting politicians or judges but by acting as if an adverse court decision did not matter.<sup>114</sup> As the letter explained: "Should abortion become illegal there will be wholesale disregard of the law."<sup>115</sup> If the Justices reversed *Roe*, women and providers would continue to exercise their rights as if nothing had changed.

### *B. NOW Members Develop Their Own Idea of Rights*

Conflict with Operation Rescue pushed NOW members to elaborate on the relationship between direct action protest and constitutional rights. In early 1989, members of the NOW Board of Directors questioned the wisdom of a strategy that depended on politically motivated judges and legislators to enforce rights.<sup>116</sup> As board member Eleanor Smeal explained, going to court empowered radical pro-lifers who wanted to "look like martyrs, especially if they can claim that the police are abusive."<sup>117</sup> If politicians had proved to be the last people deserving of trust, board members argued, feminists could count only on themselves. Smeal outlined a new strategy, one in which activists could change the situation outside of clinics. At a minimum, grassroots protests would change the media image of blockades, ensuring that pro-lifers could not "have the confrontation with the bully police that they want."<sup>118</sup> Smeal's

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112. See *infra* note 136 and accompanying text.

113. See, e.g., Letter from NOW to Chapter Presidents, *supra* note 98, at 1.

114. See *id.*

115. *Id.*

116. See NOW Board of Directors Meeting Minutes (Jan. 13-15, 1989) (on file with Harvard University, Schlesinger Library, The NOW Papers, Box 6, Folder 40).

117. *Id.* at 5.

118. *Id.*

proposal gave rise to Project Stand Up for Women, an effort to meet and push back blockaders who swarmed clinics.<sup>119</sup>

By July 1989, direct action protest came to seem something more than a way of countering bad press. Efforts to forestall an adverse decision in *Webster* came up short, infuriating members of NOW's radical wing.<sup>120</sup> Smeal, a board member and leader of the Feminist Majority Fund, asked delegates: "Is the game winning just one lousy seat or is the game changing the politics of this country?"<sup>121</sup> A Florida representative insisted that even working with sympathetic Democrats was a "serious waste of time."<sup>122</sup> Frustrated NOW leaders explored alternative solutions, including the formation of an entirely new political party. As NOW President Molly Yard asserted, "We're sick and tired of begging."<sup>123</sup>

NOW members, like those in NARAL, still believed that the right politicians and voters might reliably protect constitutional rights. However, NOW leaders sometimes worried that NARAL's political strategy would not be enough. In July 1991, Patricia Ireland, a Miami lawyer and the long-time vice president of the organization, replaced Yard as the group's leader.<sup>124</sup> With Ireland at the helm and the fate of *Roe* uncertain, NOW leaders united with other movement members seeking to use the threat to legal abortion to build momentum during the 1992 election season.<sup>125</sup> Privately, however, NOW leaders began working on an alternative approach to defining and enforcing rights. Instead of exclusively relying on politicians, as NOW members argued, feminists should borrow from the civil disobedience that had brought Operation Rescue into the spotlight.<sup>126</sup> In September 1991, anticipating an adverse ruling in *Casey*, NOW planned a conference on non-violent civil disobedience, exploring how women and providers could enforce their own rights.<sup>127</sup> Board members first worked to distinguish the civil disobedience they imagined from the activities of blockaders the movement had long labeled outlaws.<sup>128</sup> NOW leaders set forth a different idea of civil disobedience, one involving "actions of

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119. *See id.*

120. *See, e.g.,* Dan Balz, *Far-Reaching Action Urged at NOW Meeting*, WASH. POST, July 23, 1989; *NOW Eyes New Party with Clout*, USA TODAY, July 24, 1989, at 1A; *Women's Party Pushed*, CHI. SUN TIMES, July 23, 1989, at 14.

121. Balz, *supra* note 120.

122. *Women's Party Pushed*, *supra* note 120 at 14.

123. *NOW Eyes New Party with Clout*, *supra* note 120 at 1A.

124. *See, e.g.,* Ireland *Becomes President of NOW*, BOS. GLOBE, Dec. 16, 1991, at 9; Evelyn Nieves, *With Rising Voice, Acting Head of Feminist Group Assumes Mantle*, N.Y. TIMES, July 7, 1991, at 110.

125. On pro-choice rallies in the lead-up to *Casey*, see, for example, *Marching for Abortion Rights*, MIAMI HERALD, Apr. 6, 1992, at 1A; and Elizabeth Neuffer, *500,000 March for Choice*, BOS. GLOBE, Apr. 6, 1992, at 1.

126. *See, e.g.,* NOW National Board of Directors Meeting Minutes (Sept. 20-21, 1991), (on file with Harvard University, Schlesinger Library, The NOW Papers, Box 6, Folder 51).

127. *See id.*

128. *See id.*

protest that don't result in arrest, . . . open . . . plans versus the element of surprise, [and] various concepts of non-violence."<sup>129</sup>

In seeking to create a unique approach to civil disobedience, members of the group also described a different approach to enforcing rights. First, members reiterated the problems with relying on the courts or the political branches to enforce rights.<sup>130</sup> What mattered was what providers did and what women demanded. Even before the Supreme Court intervened, the movement could lose everything, because many "doctors [were not] performing abortions; those who are talk about getting out of the business."<sup>131</sup>

In 1992, with a decision looming in *Casey*, NOW members discussed more intently how feminists could enforce rights for themselves. Pro-life lawyers were uncertain about how the Court would resolve *Casey*, either overruling *Roe*, leaving the status quo in place, or settling on something in between, such as the adoption of a less-protective undue-burden test. Given that the overruling of *Roe* seemed to be a realistic possibility, pro-life activists like Denise Neary, a leading figure in the effort to pass the law challenged in *Casey*, spoke openly about the chances of getting states to ban abortion altogether. "If abortion is outlawed in this country, there will be abortions," she told the *Washington Post*, admitting that back-alley procedures would still occur.<sup>132</sup> "Abortion has always been with us. But that doesn't make it right."<sup>133</sup> NARAL predicted that at least thirteen states would ban abortions if the Court overruled *Roe*.<sup>134</sup> With the issues in *Casey* unresolved, NOW leaders considered how to define or protect abortion rights in the event that the courts no longer protected them.

At the time, NOW's membership had reached 250,000, and the organization's prominent opposition to President George H.W. Bush's nomination of Clarence Thomas to the Supreme Court had driven up both recruiting and fundraising.<sup>135</sup> In spite of changes to the organization, board members easily reached a solution about how to respond to the potential reversal of *Roe*: "[t]he consensus was to break the law."<sup>136</sup>

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129. *Id.*

130. *See id.*

131. *Id.*

132. Cynthia Gorney, *Endgame*, WASH. POST (Feb. 23, 1992), <https://www.washingtonpost.com/archive/lifestyle/magazine/1992/02/23/endgame/125da2a0-5886-41ce-9cad-13144b44cffa>.

133. *Id.*

134. *See, e.g.*, Maralee Schwartz, *Abortion Rights Group Lists 13 States Most Likely to Impose Bans*, WASH. POST (Jan. 8, 1992), <https://www.washingtonpost.com/archive/politics/1992/01/08/abortion-rights-group-lists-13-states-likely-to-impose-bans/7f7160f8-7f97-418a-8725-962ddb247ede>.

135. *See, e.g.*, Beverly Beyette, *Then and NOW: Despite Media Ridicule and a Right-Wing Backlash, the National Organization for Women Continues to Champion the Cause of Feminism under President Patricia Ireland*, L.A. TIMES, Feb. 24, 1992, at 1; *NOW Marks 25th Year: Embraces Outsider Status, Urges "Global Feminism,"* DALL. MORNING NEWS, Jan. 12, 1992, at 9A.

136. NOW National Board of Directors Meeting Minutes (Apr. 24-25, 1992) (on file with Harvard University, Schlesinger Library, The NOW Papers, Box 6, Folder 53).

Dialogue about non-violent civil disobedience gave rise to an alternative idea of the value of rights enforcement. One board member compared abortion-rights supporters to the civil rights movement, explaining: "they were successful because the blacks broke laws that spoke directly to the unavailability of their rights, and we should do the same."<sup>137</sup> Without grassroots action, rights would remain abstract, and the public would understand neither what they were nor why they mattered. Civil disobedience would bring these abstractions to life, making a moral case for the liberties women demanded.<sup>138</sup>

At the same time, as the board argued, non-violent civil disobedience revealed that lay citizens, not lawmakers, bore the responsibility for enforcing their own rights. The board outlined a number of strategies for delivering abortion services, all of them "show[ing] how easy it is to provide healthcare for women."<sup>139</sup> NOW members planned to hold strikes, to block the path of police officers arresting providers, and to pour coat hangers on the steps of the Supreme Court.<sup>140</sup> Some of these actions served conventional ends, such as "forc[ing] media coverage through the November election" and potentially making a difference in crucial races.<sup>141</sup> However, for NOW, non-violent civil disobedience rested on a more radical idea: social movements gained rights for their members not by turning to the courts but by enforcing those rights on the streets. After *Casey*, the board vowed to create nothing less than "an underground railroad to provide abortion."<sup>142</sup>

New political opportunities and challenges led NOW leaders to set aside this new idea of rights. *Casey* did not overrule *Roe*, eliminating any urgent need for civil disobedience or the creation of an underground abortion network.<sup>143</sup> Bill Clinton, a supporter of abortion rights, won the 1992 presidential race, and a pro-choice majority took power in Congress.<sup>144</sup>

Believing that more comprehensive protections were possible, NOW leaders initially focused on opposing the Freedom of Choice Act unless it eliminated exceptions involving abortion funding and parental consultation.<sup>145</sup> The organization's abortion strategy also evolved in the face of an internal

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137. *Id.*

138. *See id.*

139. *Id.*

140. *See id.*

141. *Id.*

142. *Id.* For more on the organization's vision of non-violent civil disobedience, see "Civil Disobedience Commitment" (n.d., c. 1992) (on file with Harvard University, Schlesinger Library, The NOW Papers, Box 91, Folder 15); NOW National Board of Directors Meeting Minutes (Sept. 20-21, 1991), *supra* note 126, at 1-2.

143. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853-60 (1992) (plurality opinion).

144. On Clinton's election, see, for example, Ross, *supra* note 85, at 4; and Rubin, *supra* note 85, at 44A. On the creation of a pro-choice majority in Congress, see Joanne Cavanaugh, *Pro-Choice Backers Hail Clinton Win*, S. FLA. SUN SENTINEL, Nov. 5, 1992, at 9A.

145. *See, e.g.,* Freivogel, *supra* note 86.

mutiny led by feminists angry about the organization's emphasis on the abortion issue at the expense of equally important policy questions.<sup>146</sup> In 1993, in the lead-up to that year's board elections, a group of four mounted a challenge for the leadership of the organization, citing "growing frustration within the membership."<sup>147</sup> The leader of the dissidents, Efia Nwangaza, insisted that NOW had let go of other priorities in fixating on abortion.<sup>148</sup> Nwangaza and her allies argued that the organization's leadership remained predominantly white and middle class.<sup>149</sup> As a result, Nwangaza insisted that NOW had treated abortion as a stand-alone issue instead of positioning it as just one part of a broader healthcare agenda.<sup>150</sup> "Abortion is but one aspect of a larger issue," she explained at a news conference on the issue.<sup>151</sup>

Although maintaining power, Patricia Ireland and her colleagues moved to demonstrate their accomplishments, seizing more realistic political opportunities and countering the efforts of clinic blockaders.<sup>152</sup> However, Nwangaza's push for a broader reproductive-health agenda had a more lasting influence.<sup>153</sup> Later, NOW would endorse calls for reproductive justice rather than reproductive rights, focusing more on the concerns of poor women and women of color.<sup>154</sup>

However, the concerns about rights dependent on lawmakers did not easily fade away. In the mid-1990s, worried about a changing health care landscape, a shrinking provider population, and the campaign to ban dilation and extraction abortion, clinic workers organized a new challenge to the movement's reliance on rights discourse and constitutional law, presenting both as a hindrance to any true movement for reproductive justice.

### III. MOVEMENT DISSIDENTS REDEFINE RIGHTS DISCOURSE AS AN OBSTACLE

By the mid-1990s, mobilized providers set out to create a new reproductive-health politics, one largely separated from the idea of rights. Working in the National Coalition of Abortion Providers (NCAP), these

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146. See, e.g., *NOW Faction Hopes to Unseat Current Leaders*, PITT. POST-GAZETTE, June 18, 1993, at A14; *NOW Leaders Targeted by Dissident Members*, SEATTLE POST-INTELLIGENCER, June 18, 1993, at A3.

147. *NOW Rebels Launch Bid to Unseat Leadership*, CHI. TRIB., June 18, 1993, at 14.

148. See *id.*

149. See Andrea Stone, *At Crossroads, NOW to Pick Leader, Direction*, USA TODAY, July 2, 1992, at A3.

150. See *NOW Faction*, *supra* note 146, at A14.

151. *NOW Rebels Launch Bid*, *supra* note 147.

152. On Ireland's reelection, see, for example, *NOW Chooses Ireland for 4 Year Term*, ST. LOUIS POST-DISPATCH, July 4, 1993, at 8D. On NOW's abortion activities in the mid-1990s, see *NOW Activists Vow to Use Melbourne Case*, ORLANDO SENTINEL, July 2, 1994, at A14; and *NOW Promises to Capitalize on Abortion Ruling*, S.F. CHRON., July 2, 1994, at A7.

153. See *infra* Part III.

154. *Id.*

activists spotlighted the costs of rights rhetoric and a focus on constitutional law. By investing so much in keeping abortion legal, NCAP argued, the movement had put certain arguments off limits, fueling opposition accusations of dishonesty and amorality. At the same time, NCAP leaders asserted that by refusing to tackle hard ethical or emotional questions, the movement had failed to connect to the Americans who benefited from reproductive health services. Rather than talking about or defending rights, NCAP wanted to explain the moral value of legal abortion. This Part begins by studying the roots of the providers' movement in pro-choice organizing. With this foundation in place, it turns next to the context of NCAP's protests in the early 1990s. Finally, this Part examines why NCAP's challenge to a rights-centered strategy fell short.

### *A. A Movement for Providers Organizes*

Resistance to the movement's emphasis on rights began in an established movement of clinic workers. The providers' movement took shape in the late 1970s in the face of a rapidly changing health care landscape. In the late 1970s, when the federal government and many states banned the use of public dollars or facilities for abortion, abortion care moved from hospitals to freestanding clinics.<sup>155</sup> According to a 1982 study published in *Family Planning Perspectives*, the percentage of hospital procedures decreased from fifty-two percent in 1973 to twenty-two percent in 1980.<sup>156</sup> With Medicaid funding unavailable, fewer hospitals offered the procedure, and with improvements in obstetrical and gynecological care, independent clinics could more easily offer abortions at a low cost.<sup>157</sup> With many clinics specializing in reproductive health services, providers encountered political hostility and legal threats other health care professionals often avoided.

Formed in 1977, the National Abortion Federation (NAF) organized to set guidelines for abortion care and to encourage providers to mobilize.<sup>158</sup> The organization, already representing over 160 facilities by 1979, formed a legislative action committee and vowed to "assume a more aggressive

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155. On the impact of the Medicaid cutoff on abortion services, see, for example, Stanley K. Henshaw & Lynn S. Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 FAM. PLAN. PERSP. 170, 170-80 (1984).

156. See Stanley K. Henshaw, Jacqueline Derrosh Forrest, Ellen Sullivan & Christopher Tietze, *Abortion Services in the United States, 1979-1980*, 14 FAM. PLAN. PERSP. 5, 5-15 (1982); see also Stanley K. Henshaw, Jacqueline Derrosh Forest & Elaine Blaine, *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. SERV. 119, 119-27 (1984).

157. See, e.g., Henshaw, Forest & Blaine, *supra* note 156, at 124 ("The lack of abortion services in most hospitals, combined with new evidence that abortion can be safely performed in a non-hospital setting, has led to a steady increase in the number of abortions performed at clinics.").

158. On the founding of NAF, see CAROL E. JOFFE, *DOCTORS OF CONSCIENCE: THE STRUGGLE TO PRESERVE ABORTION BEFORE AND AFTER ROE V. WADE* 174 (1996); and STAGGENBORG, *supra* note 16 at 84.

posture.”<sup>159</sup> From the outset, NAF had a large, diverse membership that included independent abortion providers, Planned Parenthood clinic operators, businessmen seeking to enter a new reproductive health service, physicians, and political activists concerned about the legal status of abortion rights.<sup>160</sup> NAF members held varying views about the ideal model for delivering abortion services: while feminists who operated women’s health clinics viewed healthcare delivery as a matter of sex equality, some of NAF’s physician members argued for a more traditional, medical approach to abortion care.<sup>161</sup> Although the diversity of NAF members sparked a rich and productive discussion about how best to approach abortion care, the cracks in the organization were visible from the beginning.<sup>162</sup>

Concern about the value of rights rhetoric emerged first in the feminist wing of the providers’ movement, a group originally committed to defining abortion as more than a simple medical service.<sup>163</sup> After the Supreme Court decided *Roe*, new feminist health centers opened their doors. Leaders of these clinics saw feminism as a priority.<sup>164</sup>

Feminist perspective on the shortcomings of rights discourse connected to a longstanding critique of the mainstream medical system—one that divided the provider community.<sup>165</sup> Feminist women’s health activists wanted to expose and remedy problems with the medical establishment, including the side effects of oral contraceptives, a lack of informed consent, the risks associated with the Dalkon Shield, and the cancer cases connected to diethylstilbestrol (DES), a drug designed to prevent miscarriages.<sup>166</sup> While feminist activists charged medical professionals with indifference to women’s needs and experiences, established doctors worried that feminist counselors lacked the qualifications to

159. Nadine Brozan, *Abortion Rights in Peril, Say Advocates at Conference*, N.Y. TIMES, July 20, 1979, at A14. For more discussion of NAF’s early activities, see Jeannette H. Johnson, *Abortion and Women’s Health: A Meeting of the National Abortion Federation*, 14 FAM. PLANNING PERSP. 327, 327-28 (1982); Uta Landy & Sara Lewit, *Administrative, Counseling, and Medical Practices in National Abortion Federation Facilities*, 14 FAM. PLAN. PERSP. 257, 257-62 (1982); and Deborah Maine, *NAF Sets Sights on Quality Care*, 11 FAM. PLAN. PERSP. 303, 303-07 (1979).

160. See JOHANNA SCHOEN, *ABORTION AFTER ROE: ABORTION AFTER LEGALIZATION* 97-104 (2015).

161. *See id.*

162. *See id.*

163. On the spread of feminist women’s health centers after *Roe*, see FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN’S MOVEMENT IN AMERICA SINCE 1960*, at 227-35 (1999); and SANDRA MORGEN, *INTO OUR OWN HANDS: THE WOMEN’S HEALTH MOVEMENT IN THE UNITED STATES, 1969-1990*, at 70-105 (2002).

164. Paula Span, *Health: A New Era for Feminist Health Clinics*, N.Y. TIMES, Nov. 23, 1980, at SM27.

165. *See generally* HEATHER MUNRO PRESCOTT, *THE MORNING AFTER: A HISTORY OF EMERGENCY CONTRACEPTION IN THE UNITED STATES* (2011).

166. *See* DAVIS, *supra* note 163, at 231-45; WENDY KLINE, *BODIES OF KNOWLEDGE: SEXUALITY, REPRODUCTION, AND WOMEN’S HEALTH IN THE SECOND WAVE* 109-16 (2008); MORGEN, *supra* note 163, at 70-74.

advise patients.<sup>167</sup> As Warren H. Pearse, the executive director of the American College of Obstetricians and Gynecologists, explained in 1980, “While we’d like women to know their own bodies, our biggest concern is the sense of false assurance from an untrained care giver.”<sup>168</sup>

The fault line in the provider community widened in the late 1980s, when feminists questioned not only the wisdom of mainstream practitioners’ approach to medical care but also the political, rights-based strategy NAF deployed. Conflict with NAF came to the surface during debates within the organization’s Feminist Caucus, a group that brought together feminist providers and advocates from organizations like NOW and the 80% Majority, a pro-choice political action group.<sup>169</sup> In April 1989, with *Webster* looming, caucus members took issue with the tactics on which mainstream pro-choice advocates relied.<sup>170</sup> Some complained that providers made as little as \$20,000 a year while pro-choice lobbyists “fund-rais[ed] off [their] backs.”<sup>171</sup>

This led some members to question the wisdom of the strategy pursued by NOW and its allies. Caucus member Charlotte Taft asked why providers were not a “political force” when so many women needed reproductive health services.<sup>172</sup> For Taft and her colleagues, the question mattered in a world where neither the courts nor the political branches reliably supported legal abortion. “We need to face up and stop denying our situation,” she insisted. “Let’s pretend *Roe v. Wade* is gone. Some people need to explore alternative routes.”<sup>173</sup> Patricia Ireland of NOW countered that the movement should focus on preserving existing rights, stating that it would be “dangerous to let it be known to politicians and the media that we have given up on *Roe*.”<sup>174</sup> Ireland failed to reassure caucus members worried about existing strategic approaches. Caucus member Peg Johnston spoke up for those convinced that the movement needed to “find [its] own positive energy, not react to the [opposition].”<sup>175</sup> Spurred on by their dissatisfaction with NAF, Johnston and Taft would later play an important role in organizing providers, helping to found both NCAP and the November Gang, a group that developed new counseling strategies and

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167. On tensions between feminist women’s health activists and the medical establishment, see Wendy Kline, *The Making of Our Bodies, Ourselves: Rethinking Women’s Health and Second-Wave Feminism*, in *FEMINIST COALITIONS: HISTORICAL PERSPECTIVES ON SECOND-WAVE FEMINISM IN THE UNITED STATES* 74-75 (Stephanie Gilmore ed., 2008); KLINE, *supra* note 166, at 59-61 (on feminist attempts to revamp the Pelvic Teaching Program at medical schools); Span, *supra* note 164.

168. Span, *supra* note 164. For more on competition between feminist health clinics and doctors, see MORGAN, *supra* note 163, at 54-55, 71-74; and Jo Thomas, *Tallahassee Feminists and Doctors at Odds*, N.Y. TIMES, Nov. 18, 1979, at 26.

169. See NAF Feminist Caucus Meeting Minutes (Apr. 11, 1989) (on file with Duke University, Bingham Library, The Peg Johnston Papers, Box 2, November Gang/NAF Feminist Caucus Folder).

170. See *id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

pushed for a voice for providers in Washington, D.C.<sup>176</sup> Dissatisfaction with NAF ultimately led providers to form a new, more overtly political organization, one that questioned the strategies used by NARAL and NOW.<sup>177</sup>

*B. Providers Question the Wisdom of a Rights-Centered Strategy*

After *Webster* came down, providers' worries about a rights-centered strategy came to a crisis, prompting activists like Taft and Johnston to form an organization for independent clinic leaders who felt "isolated and unsure of what to do next."<sup>178</sup> Those providers and directors formed the November Gang, a provider group, not only to offer support to struggling clinic workers but also to create a place where activists could exchange ideas about the future of the movement.<sup>179</sup> Members envisioned a national organization that would educate the public about what providers did. At first, some resisted the idea of forming a new organization, asking NAF leaders to change the organization's agenda. As Peg Johnston, a member of the November Gang, wrote to Nicki Nichols Gamble of NAF: "[T]he public must understand that . . . we are not profiteers; that we are under siege by anti-choice fanatics . . . , that we are responsible for many innovations in healthcare delivery such as informed consent . . . ."<sup>180</sup>

In spite of Johnston's efforts to change NAF from within, the push for a new organization continued. Johnston and her colleagues contacted Ron Fitzsimmons, a former NARAL lobbyist, to change the conversation about reproductive health in Congress.<sup>181</sup> In setting forth the plan for the National Coalition of Abortion Providers (NCAP), Fitzsimmons described some of the flaws built into a rights-centered strategy.<sup>182</sup> During testimony on FOCA, as Fitzsimmons reported, abortion opponents "spent their time painting a gruesome picture of how the 'cold, calculating' clinic operators take advantage of women."<sup>183</sup> By showcasing what women had the power to do, pro-choice witnesses and politicians could not "set the record straight about what actually goes on in a clinic."<sup>184</sup> For many providers, a rights-centered strategy had fallen sadly short. As Fitzsimmons explained, providers had to steer dialogue away

176. On the founding of the November Gang, see, for example, SCHOEN, *supra* note 160, at 247-49.

177. On the reasons for the founding of NCAP, see, for example, *id.*; and Ralph Jimenez, *Abortion Clinics Wary of Planned Parenthood Moves*, BOS. GLOBE, July 10, 1993, at 13.

178. Letter from Charlotte Taft to Abortion Providers (Aug. 2, 1989) (on file with Duke University, Bingham Library, The Peg Johnson Papers, Box 2, November Gang/NAF Feminist Caucus Folder).

179. On the founding of the November Gang, see, for example, PATRICIA BAIRD-WINDLE & ELEANOR J. BADER, *TARGETS OF HATRED: ANTI-ABORTION TERRORISM 136-67* (2001).

180. Letter from Peg Johnston to Nicki Nichols Gamble (Mar. 15, 1990) (on file with Duke University, Bingham Library, The Peg Johnson Papers, Box 2, November Gang/NAF Feminist Caucus Folder).

181. See Letter from Ron Fitzsimmons to Peg Johnston, *supra* note 70, at 1-8.

182. See *id.*

183. *Id.* at 6.

184. *Id.*

from constitutional abstractions, “com[ing] out of the closet” and “educating the public about the services . . . they provide women.”<sup>185</sup> Fitzsimmons suggested that rights rhetoric left little room for discussion of the services providers offered to women and the supportive environment that many clinics tried to create.<sup>186</sup>

At first, after its founding in 1990, NCAP mostly tackled issues deemphasized by established organizations without directly critiquing the work of groups like NARAL or Planned Parenthood. Independent providers asked for support in marketing, opening new clinics, and managing malpractice insurance.<sup>187</sup> Clinic directors also exchanged ideas about how to compete with Planned Parenthood or to convince health maintenance organizations (HMOs) to contract with independent clinics.<sup>188</sup>

In 1991, NCAP took on the issue of “phony clinics,” targeting crisis pregnancy centers that held themselves out as abortion clinics but in reality offered pro-life counseling.<sup>189</sup> While NCAP fell short of securing legislation on the subject, the organization reached an agreement with the Association of Directory Publishers, a consortium of phonebook publishers, to list pregnancy crisis centers separately from abortion clinics.<sup>190</sup> As early as 1991, NCAP helped to get the issue of clinic protection on the national agenda when Representatives Mel Levine (D-Cal.) and Charles Schumer (D-N.Y.) sponsored a federal law making it a crime to block access to clinics.<sup>191</sup> Because of these successes, the organization grew rapidly, expanding from a handful of clinics in 1990 to over 150 members in 1993.<sup>192</sup>

In 1992, the *Casey* decision pushed NCAP members to move beyond filling gaps in the agenda of mainstream groups. Planning to use an adverse outcome to elect a pro-choice president and Congress, groups like NARAL framed *Casey* as a bitter defeat. For example, Kelli Conlon, a NARAL spokesperson, told the media: “We think American women lost the right to

185. *Id.* For more discussion of the events leading up to the formation of NCAP, see Letter from Ruth Arick to November Gangers (Feb. 1990) (on file with, Duke University, Bingham Library, The Peg Johnston Papers, Box 2, November Gang/NAF Feminist Caucus Folder).

186. See Letter from Ron Fitzsimmons to Peg Johnston, *supra* note 70, at 1-3.

187. See, e.g., NCAP Plan for Survival (Feb. 13, 1992) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1).

188. See, e.g., *id.*

189. For coverage of the phony clinic hearings and NCAP’s role in shaping them, see, for example, *Deceptive Abortion Clinics Harass Women, Witnesses Tell Lawmakers*, DALL. MORNING NEWS, Sept. 21, 1991, at 10A; and Maria Douglas, *Women Say Bogus Clinics Badgered Them*, MIAMI HERALD, Sept. 19, 1991, at 16.

190. See NCAP Plan for Survival, *supra* note 187, at 1-2.

191. See, e.g., *Pro-Abortion Forces Embrace Obscure Law*, HOUS. CHRON., Sept. 12, 1993, at A1; Alan K. Ota & Don Hamilton, *Former Aide to Aucoin Listed Among the Top Lobbyists in D.C.*, SUNDAY OREGONIAN, Apr. 11, 1993, at A12. Later, Congress would pass the Freedom of Access to Clinic Entrances Act, a law that resembled Schumer and Levine’s proposal. See Pub. L. No. 103-259 (1994), 108 Stat. 694 (codified at 18 U.S.C. § 248).

192. See, e.g., Sandra G. Boodman, *The Dearth of Abortion Doctors*, WASH. POST, Apr. 20, 1993, at 7.

choose today.”<sup>193</sup> Mainstream organizations’ response to *Casey* worried providers dealing with confused and anxious patients. Fitzsimmons summarized members’ concerns as follows: “There is a concern that, because of the heightened rhetoric (some of it politically necessary), many women might think that abortion is illegal.”<sup>194</sup> Fitzsimmons explained that while political activists had reason to play up the threat to legal abortion, providers had to convince women that reproductive-health care was still accessible and did not violate any criminal law.<sup>195</sup>

While reassuring patients, members also contended that a rights-centered message fueled opposition allegations about providers.<sup>196</sup> Rights rhetoric put center stage the boundary between state power and individual liberty. By extension, in defending rights, activists denounced legal restrictions that cut away at women’s freedom. For providers, such criticism sometimes reinforced public discomfort with providers and their work. “While the Supreme Court said restrictions could be imposed on the provision of abortion services, the fact is most abortion providers already impose their own ‘restrictions,’” Fitzsimmons wrote his members.<sup>197</sup> NCAP members set out to educate policymakers and members of the public about the fact “that clinics have ‘waiting periods,’ that abortion providers invented ‘informed consent’ provisions and that clinics encourage (and some require) parental/adult involvement.”<sup>198</sup>

In the winter after the decision of *Casey*, NCAP members began formulating a message no longer centered on the Constitution. The organization first experimented with a new rhetorical approach in a press release about fetal killing.<sup>199</sup> Since 1973, mainstream pro-choice groups had mostly dodged the subject, emphasizing that religious, legal, medical, and ethical authorities could not reach a consensus on when life began.<sup>200</sup> NCAP members suggested that downplaying fetal killing patronized women and allowed abortion opponents to claim the moral high ground. “[E]very woman who enters our clinics knows what she is doing when she decides to terminate a pregnancy,” the press release asserted.<sup>201</sup> “She knows that if she does not terminate the pregnancy, she will give birth to a baby. That is what makes the abortion decision so difficult for most women.”<sup>202</sup> Instead of describing what women had the liberty to do,

193. Sara Fritz, *The Abortion Decision*, L.A. TIMES, June 30, 1992.

194. Letter from Ron Fitzsimmons to NCAP Members (July 30, 1992) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1).

195. *See id.*

196. *See id.*

197. *Id.*

198. *Id.*

199. *See* Press Release, NCAP, *Is Abortion Murder?* (Nov. 17, 1992) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1).

200. *See id.* at 1-2.

201. *Id.*

202. *Id.*

NCAP argued that the emotional complexity of abortion explained why the government should allow women to make their own decisions.<sup>203</sup> It was because of, not in spite of, the moral stakes of abortion that the procedure mattered so much. The press release stated: "No one can understand what a woman goes through at this time of her life. That is why the decision must ultimately be left to the woman."<sup>204</sup>

During the mid-1990s, NCAP members built on the fetal-killing release, highlighting the difference between secure abortion rights and meaningful access to abortion. "While the right to obtain an abortion appears relatively safe," Fitzsimmons stated, "that right may soon be meaningless if the number of physicians performing abortions continues to decrease at the current alarming rate."<sup>205</sup> Instead of laws codifying rights, NCAP prioritized legislation on access to clinics and security for providers. In 1993, after the murder of member Dr. David Gunn, the organization mobilized support for the Freedom of Access to Clinic Entrances Act (FACE).<sup>206</sup> Fitzsimmons went so far as telling the press that recruiting providers with the ability to perform the procedure was "not just a problem, it's *the* problem."<sup>207</sup>

### *C. In the Middle of the Partial-Birth Abortion Wars, NCAP Proposes an Alternative Approach*

By 1997, with the abortion battle focused on the dilation and extraction procedure (D&X), popularly known as partial-birth abortion, NCAP wanted to transform what many viewed as a devastating setback for the pro-choice movement into an opportunity to change movement rhetoric.<sup>208</sup>

By the mid-1990s, the D&X debate had redefined dialogue about abortion. In 1995, Ohio became the first state to ban elective D&X.<sup>209</sup> By September

203. *See id.*

204. *Id.*

205. Memorandum from Ron Fitzsimmons to NCAP Members, *Our Message 2* (Dec. 3, 1992) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1); *see also Abortion Providers' Day on Capitol Hill* (Oct. 27, 1993) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1).

206. On NCAP's push for clinic-protective legislation, see Memorandum from National Coalition of Abortion Providers, *Physicians Seek Federal Protection* (Oct. 27, 1993) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1); and *Congress Holds Oversight Hearings on FACE* (Sept. 19, 1994) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1, Bingham Library).

207. Boodman, *supra* note 192.

208. For more on the partial-birth abortion campaign, see, for example, Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); and Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1706-35 (2008).

209. On the Ohio ban, see, for example, *Ohio Becomes First to Outlaw "Dilation" Abortions*, MEM.COM. APPEAL, Aug. 18, 1995, at A11; and *State to Fight for Late Term Abortion Law Despite Ruling*, COLUMBUS DISPATCH, Dec. 15, 1995, at 5C.

1996, Congress had introduced a ban at the federal level.<sup>210</sup> After President Bill Clinton vetoed the law, Democrats in Congress simply proposed a narrow ban of their own.<sup>211</sup> Even NARAL leader Kate Michelman seemed ready to accept a bill including exceptions for the woman's health and fetal defects.<sup>212</sup>

How could pro-choice leaders win a losing issue? Planned Parenthood leaders insisted that constitutional liberty remained the primary issue, while D&X remained "extremely rare and done only in cases when the woman's life is in danger or in cases of extreme fetal abnormality."<sup>213</sup> NAF released statistics suggesting that providers primarily used D&X in the second trimester, ending wanted pregnancies only after a woman learned of a risk to herself or to her child.<sup>214</sup> More significantly, NARAL and other groups described the bill as a direct attack on constitutional liberty. Michelman agreed that the "bill . . . would devastate *Roe v. Wade* and the freedom to choose."<sup>215</sup>

In responding to the new challenge of D&X bans, mainstream groups like NARAL, Planned Parenthood, and NOW still largely treated rights as a part of ordinary politics, emphasizing strategies that would maximize public support for the procedure. At a tactical symposium hosted by Planned Parenthood in the middle of the partial-birth abortion wars, some attendees echoed NCAP's concerns that the movement fed into opposition efforts to stigmatize the procedure.<sup>216</sup> In particular, by talking about choice in abstract terms, as some activists claimed, the movement made abortion "a dirty word that [. . .] can't be said."<sup>217</sup>

However, most at the meeting expressed the opposite concern, maintaining that the movement had not done enough to convince sexually conservative Americans.<sup>218</sup> "[W]hat we stand for," as one attendee explained, "is not everybody-doing-it-when-they-want-to-do-it-with-whom-they-want-to-do-it-

210. See, e.g., David Espo, *Late-Term Abortion Ban Passes Congress*, PITT. POST-GAZETTE, Mar. 28, 1996, at A1.

211. For discussion of the Clinton veto, see, for example, Alison Mitchell, *Clinton, in Emotional Terms, Explains His Abortion Veto*, N.Y. TIMES (Dec. 14, 1996), <http://www.nytimes.com/1996/12/14/us/clinton-in-emotional-terms-explains-his-abortion-veto.html>; and *Clinton's Foes Keep Focus on His Veto of Late-Term Abortion Ban*, DALL. MORNING NEWS, May 28, 1996, at 7A.

212. See, e.g., Melissa Healy, *Senate Votes to Sustain Veto of Late-Term Abortion Ban*, L.A. TIMES (Sept. 27, 1996), [http://articles.latimes.com/1996-09-27/news/mn-48172\\_1\\_late-term-abortion-procedure](http://articles.latimes.com/1996-09-27/news/mn-48172_1_late-term-abortion-procedure); Joan Lowy, *Dems Try to Ban Late Abortion*, CIN. POST, Nov. 27, 1996, at A1; Jill Zuckman, *Daschle Urges Compromise on Late Term Abortion Bill*, BOS. GLOBE, Nov. 27, 1996, at A11.

213. Bill Straub, "Scissors" *Abortion Stirs Fight*, CIN. POST, Sept. 18, 1996, at 1A.

214. See, e.g., *id.*; see also Carol Byrne, *The Right Over Partial Birth Abortion Is Fraught with Emotion, Politics, and Questions*, STAR TRIB., Feb. 9, 1997, at 1A; David Waters, *Late Term Abortion Technique Heats Up Debate*, CLEV. PLAIN DEALER, Sept. 19, 1996, at 14A.

215. Ann Devroy, *Late Term Abortion Ban Vetoed*, WASH. POST (Apr. 11, 1996), <https://www.washingtonpost.com/archive/politics/1996/04/11/late-term-abortion-ban-vetoed/857678df-deea-40b8-9abe-d1d5ee4f0a1c>.

216. See Planned Parenthood, *Roe v. Wade at 25: A Symposium* 46-47 (n.d., c. 1998) (on file with Duke University, Bingham Library, The Takey Crist Papers, Box 27, Planned Parenthood Folder).

217. *Id.*

218. See *id.*

all-the-time.”<sup>219</sup> In the aftermath of the strategy session, Planned Parenthood developed a campaign, *Responsible Choices*, intended to highlight “informed, responsible decisions about sex, relationships, and reproduction.”<sup>220</sup>

Like Planned Parenthood, NARAL deemphasized not only D&X but the abortion procedure as a whole. In 1994, the organization circulated *Promoting Reproductive Choices*, a document setting forth a multi-issue agenda and a message centered on personal responsibility for reproductive decision-making.<sup>221</sup> “In exercising their reproductive freedom, women and men must consider the impact their decisions have on their partners, families, and communities,” NARAL argued in 1994.<sup>222</sup> “The role of government is to enable individuals to take responsibility for their decisions.”<sup>223</sup>

Later in the partial-birth abortion battle, the NARAL Foundation developed *Choice for America*, a campaign still emphasizing women’s “responsible, deliberate” sexual and reproductive decisions.<sup>224</sup> *Choice for America* also showcased constitutional arguments, asserting: “The freedom to choose is a central, fundamental American value—as integral to our way of life as the freedom to worship.”<sup>225</sup> A coalition of advocates gathered to strategize about D&X adopted a similar message in 1996, concluding that advocates should try to “keep debate focused on the individual right to choose, not the details of the procedure.”<sup>226</sup>

However, for NCAP members, the movement’s D&X strategy brought to light larger problems with a strategy centered on the Constitution. On the pro-life side, American Victims of Abortion and other groups publicizing the supposed dangers of post-abortion trauma drew unprecedented attention to women’s emotional response to abortion.<sup>227</sup> Like other pro-choice advocates,

219. *Id.*

220. Planned Parenthood, *Responsible Choices Action Agenda* (1997-1998) (on file with Duke University, Bingham Library, The Takey Crist Papers, Box 27, Planned Parenthood Folder). For more on Planned Parenthood’s strategy in the period, see *Planned Parenthood Explores Religious Grounds for Choice*, ST. LOUIS POST-DISPATCH, Dec. 6, 1998, at C2; *Planned Parenthood Takes New Aim at Teen Pregnancy*, S. FLA. SUN-SENTINEL, Feb. 5, 1997, at 4B; and Steve Proffitt, *Interview with Gloria Feldt: Advocate for Abortion Rights Wins Hearts and Minds, But Not the War*, L.A. TIMES, Dec. 13, 1998, at 3.

221. See NARAL, *Promoting Reproductive Choices*, at vi (n.d., c. 1994) (on file with Duke University, Bingham Library, The Robin Chandler Duke Papers, Box 2, NARAL 25th Anniversary Folder).

222. *Id.*

223. *Id.*; See generally Kate Michelman, *The Moral Choice: Elevate Parenting*, L.A. TIMES, Aug. 11, 1996, at M5.

224. NARAL Foundation, *Choice for America* (n.d., c. 1999) (on file with Duke University Bingham Library, The Robin Chandler Duke Papers, Box 2, NARAL Miscellaneous Folder).

225. *Id.* For more on *Choice*, see VICKI RUTLEDGE SHIELDS, HOW ADVERTISING AFFECTS SELF-IMAGE 168 (2002).

226. Katherine Q. Seelye, *Abortion-Rights Backers Defend Stance on Late Term Abortion Procedure*, N.Y. TIMES, Feb. 27, 1997, at A21.

227. On the American Victims of Abortion, see, for example, Janet Cawley, *The Stakes Are High, and So Are the Emotions*, CHI. TRIB., Apr. 26, 1989, at 14; Margaret Wolf Freivogel, *Abortion*

NCAP members presented Partial Birth Abortion Syndrome (PAS) as a political ploy rather than a scientific reality.<sup>228</sup> At the same time, frustrated by the tenor of mainstream debate, Fitzsimmons gave an interview on D&X, admitting that he had “lied” about the number of procedures performed annually.<sup>229</sup> Although regretting framing his previous statements as false, Fitzsimmons explained that he no longer wanted to apologize for a D&X procedure that many providers viewed as both necessary for women’s health and morally just.<sup>230</sup> In Fitzsimmons’s view, his statement stemmed from a belief, widely shared within the organization, about “the reasons that [movement members] need to be frank with the public on all aspects of abortion.”<sup>231</sup>

However, for leaders of mainstream organizations, Fitzsimmons’s admission seemed disastrous, playing into the hands of an opposition that wanted the public not to think about constitutional rights. “He’s suggested somehow he lied, and we are implicated in his charade,” Michelman stated.<sup>232</sup> “We don’t agree with that.”<sup>233</sup> Leaders of the Center for Reproductive Law and Policy denounced Fitzsimmons for “call[ing] our integrity into question.”<sup>234</sup>

By contrast, for some NCAP members, Fitzsimmons’s statement created a valuable opportunity. “The conversation about abortion is not going to transform because of Planned Parenthood or NAF or any of the groups that are still holding on to old paradigms,” Charlotte Taft wrote her colleagues.<sup>235</sup> In place of an apologetic, rights-centered dialogue, providers could finally tell the public what they had learned from women who had abortions. Taft saw Fitzsimmons’s statement as an opening for those interested in creating a message and a reform agenda separate from constitutional rights. She saw great potential for a movement that could “define and articulate a vision that women could really relate to (beyond having a right to choose something that they

*Strategies Planned*, ST. LOUIS POST-DISPATCH, July 6, 1989, at 1A; Mary Schmich, *An Explosive Issue*, CHI. TRIB., July 24, 1989, at 1.

228. See, e.g., NCAP, *Partial Birth Abortion Act Update* (Apr. 13, 1996) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1) (arguing that Republicans prioritized D&X bans as a way to “target the sizable Catholic vote in key swing states”).

229. On Fitzsimmons’ admission, see, for example, Mona Charen, Editorial, *Truth Finally Emerges About Partial-Birth Abortion*, ST. LOUIS POST-DISPATCH, Mar. 2, 1997, at 3B; and Mike Royko, Editorial, *The Lies Behind Late Term Abortions*, CLEV. PLAIN DEALER, Mar. 6, 1997, at 11B.

230. Ron Fitzsimmons, *Partial-Birth Abortion Update* (Nov. 17, 1997) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Folder 1).

231. See *id.*

232. Seelye, *supra* note 226, at A21.

233. *Id.*

234. Letter from Center for Reproductive Law and Policy to NCAP Provider (Feb. 28, 1997) (on file with Duke University, Bingham Library, The NCAP Papers, Box 1, Ron Fitzsimmons Folder). For more on the response to Fitzsimmons’s statement, see Helen Dewar, *Clinton May Ease Stand on Abortion*, WASH. POST, May 14, 1997, at A6; *A Look at the New Politics of Abortion*, WASH. POST, June 1, 1997, at C3.

235. E-mail from Charlotte Taft to Ron Fitzsimmons (Jan. 6, 1998) (on file with Duke University, Bingham Library, The Claire Keyes Papers, Box 1, National Coalition of Abortion Providers Folder).

actually don't particularly want to have in their lives—an abortion)."<sup>236</sup> As she explained: "Reproductive freedom is a means to a certain quality of life. It is the QUALITY of life and the experiences of their lives that are important to women in some ways—not birth control and abortion."<sup>237</sup>

In the aftermath of the Fitzsimmons controversy, the organization began creating a defense of legal abortion largely separate from the rights framework that had dominated discourse for decades. In testifying before Congress, Renée Chelian, the acting president of the organization, explained the importance of D&X without referring to the Constitution. "I can look my daughter in the eye and explain that intact D&X abortions are not pretty or easy," she stated.<sup>238</sup> "But it just might be the best method to preserve the health, safety, and possibly the life of the woman."<sup>239</sup> Chelian suggested that the state could trust women and providers to decide whether D&X was moral. "Those providers who perform this highly debated and discussed abortion method have come to terms with its rather gruesome details," she testified.<sup>240</sup> "To do so, we stay focused on the patient—the woman who has come to us for help."<sup>241</sup>

#### *D. In a Challenging Climate, Mainstream Organizations Resist Change*

Ultimately, however, Fitzsimmons's comments strengthened mainstream groups' commitment to constitutional discourse. In part, NCAP failed to transform dialogue about abortion because the group already competed—and sometimes clashed—with organizations that drew on the same sources of recruits and fundraising dollars. Just the same, the failure of NCAP's imagined revolution stemmed not just from internal battles but also from larger political, economic, and social shifts.

With the rise of managed healthcare and a declining abortion rate, providers' financial struggles only intensified, further dividing a marginalized community and discouraging activists from pursuing radical solutions. The shift toward managed healthcare began in the 1970s, as spiraling health care costs prompted insurers and politicians to explore new options.<sup>242</sup> Between 1970 and 1996, healthcare expenditures skyrocketed, reaching \$1.04 trillion by

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236. E-mail from Charlotte Taft to Ron Fitzsimmons et al. (Dec. 3, 1997) (on file with Duke University, Bingham Library, The Claire Keyes Papers, Box 1, National Coalition of Abortion Providers Folder).

237. *Id.*

238. *Partial Birth Abortion: The Truth: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 18-19 (1997) (statement of Renée Chelian).

239. *Id.*

240. *Id.*

241. *Id.*

242. For discussion of the spiraling costs of health care and the policy response to growing costs, see, for example, DAVID DRANOVE, *THE EVOLUTION OF AMERICAN HEALTHCARE: FROM MARCUS WELBY TO MANAGED CARE* 75-89 (2009); and JULIUS RICHMOND & RASHI FEIN, *THE HEALTHCARE MESS: HOW WE GOT INTO IT AND WHAT IT WILL TAKE TO GET OUT* 63-69 (2005).

the mid-1990s.<sup>243</sup> To control costs, insurers and physicians began experimenting with health care management organizations (HMOs) and preferred provider plans (PPOs), combining insurance and treatment for patients in return for a lump sum payment.<sup>244</sup>

Between 1973 and 1990, because of public interest in cost containment, managed health care expanded dramatically. In 1973, Congress passed the Healthcare Management Organization Act, requiring employers to offer a managed healthcare option.<sup>245</sup> With the Act in place, the health care landscape changed quickly: whereas roughly five to ten percent of Americans subscribed to a managed plan in 1980, over sixty percent had signed up by 1987, and the numbers continued to climb.<sup>246</sup> By 1995, over fifty-one million Americans subscribed to some kind of managed care plan, with the number increasing by twenty-three percent in 1992 alone.<sup>247</sup>

Because the rise of HMOs increased existing tensions between providers already confronting a declining customer base and a difficult political environment, few activists wanted to take on a more controversial or ambitious agenda. Because HMOs controlled such a large share of the market, they enjoyed a substantial bargaining advantage with providers seeking inclusion in a network.<sup>248</sup> With a nationwide network of clinics, Planned Parenthood often found a place in both HMO and PPO networks, making it harder for independent clinics to convince managed care networks to include them.<sup>249</sup> Those independent clinics that did belong to provider networks had to make a profit in a managed network environment that incentivized health care workers to cut services, salaries, and costs.<sup>250</sup> In an increasingly challenging financial climate, providers often found themselves in competition for a shrinking

243. See, e.g., *The Social Organization of Medical Workers*, in *THE SOCIOLOGY OF HEALTH AND ILLNESS: CRITICAL PERSPECTIVES* 231 (Peter Conrad ed., 7th ed. 2005).

244. See, e.g., JAN COOMBS, *THE RISE AND FALL OF HMOs: AN AMERICAN HEALTHCARE REVOLUTION* 223-24 (2005); DRANOVE, *supra* note 242, at 67-71; ROBERT I. FIELD, *MOTHER OF INVENTION: HOW THE GOVERNMENT CREATED "FREE-MARKET" HEALTH CARE* 171-73 (2014).

245. See 42 U.S.C. § 300(e).

246. On the rate of HMO subscription, see, for example, Michael Malinowski, *Capitation, Changes in Medical Technology, and the Advent of a New Era in Medical Ethics*, 22 *AM. J.L. & MED.* 331, 360 n.2 (1996).

247. See *id.*

248. "[M]anaged care organizations control costs primarily by controlling a network of providers and guaranteeing them a high volume of patients in return for lower treatment rates." William J. Bahr, *Although Offering More Freedom to Choose, Any Willing Provider Legislation Is the Wrong Choice*, 45 *U. KAN. L. REV.* 457, 582-83 (1997).

249. On the competitive advantage Planned Parenthood enjoyed over independent clinics, see, for example, MORGEN, *supra* note 163, at 151.

250. See, e.g., Ralph Jimenez, *Abortion Clinics Face Competition*, *BOS. GLOBE*, July 11, 1993, at 1; Gina Kolata, *As Abortion Rate Decreases, Clinics Compete for Patients*, *N.Y. TIMES* (Dec. 30, 2000), <http://www.nytimes.com/2000/12/30/us/as-abortion-rate-decreases-clinics-compete-for-patients.html> ; Abigail Trafford, Op-Ed, *Competing for Abortions*, *WASH. POST*, Oct. 3, 1995, at E15; cf. Brian Liang, *Patient Injury Incentives in Law*, 17 *YALE L. & POL'Y REV.* 1, 7-8 (1998) ("In the intensely competitive market of healthcare delivery, the key to survival is minimizing costs.").

customer base, making both cooperation and radical strategic change less viable.<sup>251</sup>

While a changing system of health care delivery increased internal movement tensions, political setbacks encouraged activists to consolidate existing victories. The pro-choice majority activists built up in both houses of Congress disappeared in the face of what commentators called the Republican Revolution of 1994.<sup>252</sup> Led by Minority Whip Newt Gingrich (R-Ga.), Republicans in the midterm elections achieved a fifty-two seat swing in the House, taking control for the first time since 1954.<sup>253</sup> Worse for pro-choice leaders, the election cemented Republican control in the South, with abortion opponents picking up nineteen seats and outnumbering Democrats in the region for the first time since Reconstruction.<sup>254</sup>

Some of this shift may have reflected the mobilization of conservative evangelical Protestant voters, one of the groups most vehemently opposed to abortion.<sup>255</sup> Exit polls from the midterm election showed that as many as twenty-seven percent of voters described themselves as born-again Christians, an increase of ten percent in the course of a decade.<sup>256</sup> At a time when activists struggled to preserve the status quo, movement members felt they could not afford a radical transformation of their message and agenda.

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251. In 1992, the number of abortions performed in the United States was the lowest recorded since the *Roe* decision. See, e.g., Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States, 1991 to 1992*, 26 FAM. PLAN. PERSP. 100, 100 (1994). By 1996, the rate had declined again, from roughly 1.5 million to 1.2 million. See, e.g., Stanley K. Henshaw, *Abortion Incidence in the United States, 1995 to 1996*, 30 FAM. PLAN. PERSP. 263, 263 (1998).

252. For contemporary perceptions of the Republican Revolution, see, for example, David Bowermaster, *Keeping Score on the GOP Revolution*, U.S. NEWS & WORLD REP., Aug. 21, 1995, at 35-36; Edwin Chen, *Can Gingrich Hold His Tongue for the Good of the Party?*, L.A. TIMES, Dec. 24, 1995, at 1; Godfrey Sperling, *The Republican Revolution Rolls On*, CHRISTIAN SCI. MONITOR, Oct. 31, 1995, at 19.

253. On Republican successes during the 1994 election, see, for example, SEAN P. CUNNINGHAM, AMERICAN POLITICS IN THE POSTWAR SUNBELT: CONSERVATIVE GROWTH IN A BATTLEGROUND REGION 241 (2014); STANLEY B. GREENBERG, MIDDLE CLASS DREAMS: THE POLITICS AND POWER OF THE NEW AMERICAN MAJORITY 16-19 (1995); Nicol C. Rae & Colton C. Campbell, *From Evolution to Revolution: Congress Under Republican Control*, in NEW MAJORITY OR OLD MINORITY? THE IMPACT OF REPUBLICANS ON CONGRESS 2-4 (1999).

254. On Republican successes in the South, see, for example, EARL BLACK, THE RISE OF SOUTHERN REPUBLICANS 330 (2009); and James P. Pfiffner, *The President and Congress at the Turn of the Century: Structural Sources of Conflict*, in RIVALS FOR POWER: PRESIDENTIAL-CONGRESSIONAL RELATIONS 28 (James Thurber ed., 2002).

255. On evangelical Protestant opposition to abortion in the 1990s, see, for example, MATTHEW LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 68 (2009); Clyde Wilcox, *Evangelicals and Abortion*, in A PUBLIC FAITH: EVANGELICALS AND CIVIL ENGAGEMENT 101, 112-13 (Michael Cromartie ed., 2003).

256. On evangelical voting in the 1994 election, see, for example, STEVEN P. MILLER, THE AGE OF EVANGELICISM: AMERICA'S BORN AGAIN YEARS 110 (2014); and Lyman E. Kellstedt et al., *Has Godot Finally Arrived? Religion and Realignment*, in RELIGION AND THE CULTURE WARS: DISPATCHES FROM THE FRONT 291-98 (John Clifford Green ed., 1996).

E. *The Reproductive Justice Framework Reemerges*

As Efia Nwangaza's earlier challenge suggested, women of color had long argued for a reproductive-health agenda broader than the single-focus approach often taken by organizations like NARAL.<sup>257</sup> Beginning in the 1960s and early 1970s, women of color worked to forge a broader agenda, one that included protection against sterilization abuse and support for women who wanted to bring a pregnancy to term.<sup>258</sup> These efforts intensified after 1994, when a caucus of African-American women returning from the Cairo Conference on International Population and Development took inspiration from the comprehensive vision of reproductive health set forth in international human rights law.<sup>259</sup> The 1994 Cairo Programme of Action had defined reproductive health as a human right, exposing the gap between pro-choice rhetoric at home and the bolder agenda promoted abroad.<sup>260</sup> At a meeting of the Illinois Pro-Choice Alliance in Chicago, a group of African-American women coined the term "reproductive justice" to describe the vision they identified with international human rights law.<sup>261</sup> The idea of reproductive justice wove in familiar attacks on the idea of choice, noting that poor and often non-white women lacked the support and resources to control their own reproductive lives.<sup>262</sup> As Loretta Ross has explained, "the isolation of abortion from other social justice issues that concern all our communities contributes to, rather than counters, reproductive oppression."<sup>263</sup>

The idea of reproductive justice reflected the work of established organizations like the National Black Women's Health Project (founded in 1984) and the National Latina Health Organization (founded in 1986), many of which raised concerns about a choice-centered framework in the late 1980s and

257. See *infra* notes 259-260 and accompanying text.

258. See generally JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* (2003) (tracing the mobilization of women of color around issues of reproductive justice); JAE SILLIMAN ET AL., *UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZE FOR REPRODUCTIVE JUSTICE* (2004) (same); RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA* (2005) (same).

259. See, e.g., Carole Joffe & Jennifer Reich, *The Way Forward: Moving Toward Reproductive Justice*, in *REPRODUCTION AND SOCIETY: INTERDISCIPLINARY READINGS* 239 (Carole Joffe & Jennifer Reich eds., 2015); Véronique Mottier, *Reproductive Rights*, in *THE OXFORD HANDBOOK OF GENDER AND POLITICS* 214 (Georgina Waylen et al. eds., 2013).

260. See *Report of the International Conference on Population and Development*, UNITED NATIONS ¶ 7.2 (1995), [http://www.ipci2014.org/sites/ipci2014.org/files/icpd\\_eng.pdf](http://www.ipci2014.org/sites/ipci2014.org/files/icpd_eng.pdf).

261. JESSICA LEANN URBAN, *NATION, IMMIGRATION, AND ENVIRONMENTAL SECURITY* 18-19 (2008). On the effort to connect reproductive justice to international human rights and "bring Cairo home," see JENNIFER NELSON, *MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN'S HEALTH MOVEMENT* 211 (2015).

262. See, e.g., Loretta Ross, *Understanding Reproductive Justice* (Nov. 2006), <http://www.trustblackwomen.org/our-work/what-is-reproductive-justice/9-what-is-reproductive-justice> (last visited Apr. 23, 2016); see also SOLINGER, *supra* note 258, at 248.

263. Ross, *supra* note 262.

early 1990s.<sup>264</sup> After the mid-1990s, new groups like the SisterSong Women of Color Reproductive Health Collective formed to champion the idea of reproductive justice.<sup>265</sup> To be sure, the push for reproductive justice in the mid-1990s bore some fruit. Both NARAL and Planned Parenthood adopted broader reform agendas, and NOW made welfare rights a priority.<sup>266</sup> Just the same, the mainstream movement's emphasis on a narrow idea of rights remained a constant throughout the decade.<sup>267</sup>

After 2010, however, mainstream organizations themselves adopted the rhetoric and reasoning of reproductive justice. Beginning in 2011, frustrated at its inability to reach younger women, Planned Parenthood conducted polling and focus groups that revealed that a choice-centered message did not capture the range of issues, including health care, insurance coverage, pay equity, and birth control coverage, motivating many voters.<sup>268</sup> In the 2014 election season, Planned Parenthood responded by setting aside the rhetoric of choice, searching for arguments that resonated with more women, and opening the door to a more in-depth discussion of reproductive justice.<sup>269</sup>

As early as 2004, NOW's national conference featured sessions on reproductive justice.<sup>270</sup> By 2016, the organization invoked reproductive justice in demanding access not only to abortion but also "birth control, pre-natal care, maternity leave, child care and other crucial health and family services."<sup>271</sup> As materials for the organization explained, "NOW affirms that reproductive rights are issues of life and death for women, not mere matters of choice."<sup>272</sup>

Scholars have developed a rich theoretical framework to elaborate on the ideas and experiences of grassroots champions of reproductive justice.<sup>273</sup> Defined by the work of legal commentators like Dorothy Roberts and Robin West and historians like Rickie Solinger, the new theory of reproductive justice

264. E.g., SOLINGER, *supra* note 258, at 247; URBAN, *supra* note 261, at 19.

265. See, e.g., SILLIMAN ET AL., *supra* note 258, at 42; Mottier, *supra* note 259, at 216.

266. On the expansion of NARAL's agenda beyond abortion in the period, see Charles Babington, *Abortion-Rights Group Broadens Focus*, WASH. POST, Dec. 24, 1992, at A1. On Planned Parenthood's efforts in this vein, see Shari Roan, *Moving Beyond Abortion*, L.A. TIMES, Nov. 4, 1993, at 1.

267. See *supra* Part II.

268. See, e.g., Jackie Calmes, *Activists Shun 'Pro-Choice' to Expand Message*, N.Y. TIMES (July 28, 2014), <http://www.nytimes.com/2014/07/29/us/politics/advocates-shun-pro-choice-to-expand-message.html>; Dawn Laguens, *We're Fighting for Access, Not Choice*, HUFFINGTON POST (July 30, 2014, 7:52 PM), [http://www.huffingtonpost.com/dawn-laguens/were-fighting-for-access\\_b\\_5635999.html](http://www.huffingtonpost.com/dawn-laguens/were-fighting-for-access_b_5635999.html).

269. See *supra* note 268 and accompanying text.

270. See 2004 NOW National Conference Resolutions, NAT'L NOW TIMES, Fall 2004, at 13.

271. See, e.g., *Reproductive Justice Is Every Woman's Right*, NAT'L ORG. FOR WOMEN (2016), <http://now.org/resource/reproductive-justice-is-every-womans-right>.

272. See, e.g., *Reproductive Rights and Justice*, NAT'L ORG. FOR WOMEN (2016), <http://now.org/issues/abortion-rights-reproductive-issues>.

273. See, e.g., NELSON, *supra* note 258; DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* (2001); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009).

makes a compelling case for a more comprehensive approach to reproductive health.<sup>274</sup>

However, as the Article suggests, the success of challenges to a rights-centered framework depends not only or even primarily on the emergence of new ideas. In the late 1980s and early 1990s, among supporters of reproductive equity, worries about the language of rights crossed lines of race, class, and role within the movement. In contemporary discussion of reproductive justice, advocates point out the problems with a rights-centered approach, such as the needs and services not covered by such a concept and the disconnect between women's view of reproductive health services and the movement's framing of the issues. Together with women of color, providers and some political activists made similar objections to the idea of rights in the late 1980s and early 1990s but found a largely unreceptive audience. The political environment of the period—one defined by a resurgent Republican Party, an energized Religious Right, and a competitive market for health care delivery—made movement leaders reluctant to play down constitutional discourse. As Part IV suggests, the fortunes of arguments for reproductive justice may similarly rise and fall depending not just on the intellectual case for a broad agenda but also on the political climate activists confront.

#### IV. PUTTING RIGHTS IN CONTEXT

Unearthing the history of debates between advocates of reproductive liberty about the costs of rights discourse contributes significantly to a broader scholarly discussion of whether and how constitutional discourse advances social change. Starting in the 1960s, legal commentators and historians questioned the emphasis movements put on judicial victories, seeing these often hollow victories as a symptom of both the nation's preoccupation with legalism and the limited value of constitutional rights.<sup>275</sup> While movements continued to rely on rights claims in the 1970s and 1980s, a fierce debate raged in the academy.<sup>276</sup> Although most scholars agreed that a rights-centered strategy counted among the political resources a movement could deploy,

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274. See *supra* note 276 and accompanying text.

275. For a sample of early works, see, for example, MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964); JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1964); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 *LAW & SOC'Y REV.* 29 (1969); and Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 *YALE L.J.* 314, 369 n.239 (2012).

276. For analysis of these conflicts, see, for example, Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *YALE L.J.* 1860, 1862 (1987); Tani, *supra* note 275, at 370 n.241; and Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 *WM. & MARY L. REV.* 713, 714-15, 719-21 (2011).

commentators found themselves deeply divided about whether—and when—constitutional discourse or litigation hamstrung change agents.<sup>277</sup>

More recently, legal historians, constitutional scholars, and social-movement scholars have teased out when litigation or rights-claiming furthers the work of activists seeking social change. Cautioning against broad generalization, commentators have revealed the value of constitutional discourse to be context-dependent and contingent.<sup>278</sup> Some highlight the distinction between litigation and rights-claiming, playing up the downsides of seeking change in the courts. Gerald Rosenberg contends that litigation rarely delivers the promised results while consuming precious resources.<sup>279</sup> Michael Klarman goes a step further, insisting that judicial decisions that outpace social change trigger damaging backlashes, setting back the very causes a court embraces.<sup>280</sup>

Others see litigation as a double-edged sword. On the one hand, litigation can mobilize new recruits, legitimate a movement's claims, and embolden those seeking to organize.<sup>281</sup> Victories in court can lay the foundation for collective action.<sup>282</sup> By extension, in legitimating movement demands, favorable judicial decisions can serve as an important tool for activists seeking to secure the support of political and social elites—groups that represent crucial sources of fundraising and recruits, particularly in periods when the level of inter-movement conflict is less intense.<sup>283</sup>

Moreover, courts provide a valuable political opportunity for nascent movements still unable to influence electoral politics or legislation.<sup>284</sup> Elected officials can largely control whether movements can air their grievances in the

277. See *supra* note 276 and accompanying text.

278. See, e.g., Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 890-95, 891 (2013) (reviewing JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011)) (summarizing and endorsing scholarship that “integrate[s] courts into broader political conflicts and assess[es] the impact of courts in a contextual and contingent way”).

279. See ROSENBERG, *supra* note 4, at 173-78, 201, 241; Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 810-12 (2005).

280. See KLARMAN, *supra* note 4, at x; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 465 (2004); ROSENBERG, *supra* note 4, at 415-19.

281. See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 144-45 (1994); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 944 (2011) (“Litigation wins may also generate elite support, pressure adversaries, and increase a social movement’s bargaining power.” (footnote omitted)).

282. See, e.g., Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC’Y REV. 11, 27-28 (2005).

283. See, e.g., J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 533 (1983); David S. Meyer, *Protest and Political Opportunities*, 30 ANN. REV. SOC. 125, 129-30, 137 (2004); NeJaime, *supra* note 278, at 897.

284. See, e.g., Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506, 524 (2012) (“Members of disadvantaged groups have historically used American-style public interest law, particularly court-based litigation, to leverage policy gains that could not be effectively achieved through majoritarian politics.”).

political arena.<sup>285</sup> By contrast, even in the case of recently formed movements, activists can go to court to articulate a problem with the larger society and seek some legal resolution.<sup>286</sup> In a federalist system, where federal, state, and local politics influence the membership, ideological orientation, and popular attitudes defining different courts, movements can leverage differences between levels of government and states.<sup>287</sup>

On the other hand, as Catherine Albiston argues, “litigation can change social movements from within in deeply constitutive ways even as they wield it to victory.”<sup>288</sup> Litigation can in this way transform internal movement conflicts, empowering factions that embrace a particular legal vision and silencing those who dissent.<sup>289</sup> In particular, commentators canvass how litigation moderates movement demands. William Eskridge asserts that reliance on constitutional norms leads activists to discount more radical goals.<sup>290</sup> Similarly, Reva Siegel demonstrates how activists moderate their claims as a result of movement-counter movement conflict and commitments to winning popular support.<sup>291</sup>

Historians echo this concern. Tomiko Brown-Nagin concludes that “elite-dominated interest group litigation and progressive social movements aimed at accomplishing fundamental change are distinct and largely incompatible phenomena.”<sup>292</sup> In studying the civil rights movement, Risa Goluboff illustrates how court-centered tactics led movement members to favor strategies and arguments that fit within an existing—and successful—litigation strategy over previously crucial claims for socioeconomic justice.<sup>293</sup> William Forbath shows how the labor movement’s interaction with the courts reshaped activists’ demands and consciousness in conservative ways.<sup>294</sup>

Without disregarding the importance of context, legal scholars and historians hold out more hope for rights-claiming that remains largely disconnected from litigation. Historians of the welfare-rights movement, civil

285. See, e.g., Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 688 (2012); Emily Zackin, *Popular Constitutionalism’s Hard When You’re Not Very Popular: Why the ACLU Turned to Courts*, 42 LAW & SOC’Y REV. 367, 384, 387-88 (2008).

286. See *supra* note 284 and accompanying text.

287. See David S. Meyer & Suzanne Staggenborg, *Opposing Movement Strategies in U.S. Abortion Politics*, in 28 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 207, 213 (Patrick G. Coy ed., 2008); NeJaime, *supra* note 278, at 901.

288. Albiston, *supra* note 5, at 77.

289. See, e.g., NeJaime, *supra* note 278, at 895; see also Myra Marx Ferree, *Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany*, 109 AM. J. SOC. 304, 306 (2003) (“When movements seek the advantages resonance offers they also accept political costs, particularly in marginalizing alternative frames, the speakers who offer them, and the constituencies whose concerns they express.”).

290. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 487 (2001).

291. See Siegel, *supra* note 2, at 1364.

292. Brown-Nagin, *supra* note 5, at 1445.

293. See Goluboff, *supra* note 5, at 2015-17.

294. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 128 (1991).

rights movement, and women's liberation movement showcase how constitutional discourse can crystallize activists' awareness of the need for change and empower movement members to mobilize and voice their views.<sup>295</sup> Some feminist and critical race theorists contend that under certain circumstances, rights-claiming can serve as an important tool for outsiders seeking inclusion in the larger society.<sup>296</sup> For these scholars, constitutional discourse can help to strengthen activists' political consciousness and can serve as a vehicle for transformative ideas.

For the most part, leading studies explore the value of rights-claiming to movements from the outside in, focusing on an objective analysis of the costs and benefits to change agents of using constitutional discourse. By contrast, this Article moves from the inside out, primarily examining how activists understood, resisted, and navigated the limits of rights rhetoric. Approaching the issue in this way adds a new dimension to studies of the stakes and advantages of rights talk.

First, the history of reproductive politics in the 1980s and 1990s expands our understanding of the flexibility and adaptability of constitutional discourse. At first glance, movement members seemed bound by a shared constitutional language. A deeper analysis makes plain that activists used rights rhetoric to express a rich variety of ideas about what reproductive justice meant, how social change took place, and who had the authority to enforce the Constitution. Significantly, beyond acting as a vehicle for transformative ideas, rights-claiming did not crowd out other ideas of what the movement should say. Throughout the 1980s and 1990s, different factions recognized the limits of constitutional rhetoric, and some movement members actively resisted those limitations. The success or failure of challenges to a rights-based strategy depended in part on the larger political climate—particularly, the availability of allies in Congress and state legislatures and the competition for resources and recruits. Movement dissenters continued to press their demands even when mainstream leaders expressed little interest in a change of direction.

In this way, the materials presented here highlight the potential value of rights-claiming. Constitutional discourse accommodated a variety of ideas of about reproductive health and popular engagement with legal issues. Rights

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295. See generally, e.g., FELICIA KORNBLUH, *THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA* (2007) (welfare-rights movement); NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* (2006) (civil rights movement); Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966-1974*, 28 *LAW & HIST. REV.* 577 (2010) (women's liberation movement).

296. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 145-65 (1991); Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture, and the Rhetoric of Rights*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 500, 508-10 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000). Some feminist scholars join critical race theorists in assessing the utility as well as the limitations of rights discourse. See, e.g., Elizabeth Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement*, in *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* 301, 301-19 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

talk did not have the de-radicalizing effect so many scholars identify. Some factions persisted in questioning the value of constitutional discourse while others used it to make bolder demands for change or to endorse grassroots protest tactics.

Just the same, the history of reproductive politics in the 1980s and 1990s suggests that some of the downsides scholars tie to litigation may more often involve rights-claiming than we often believe. Even when they had given up on the courts, leading supporters of reproductive liberty prioritized legal access to abortion, whether secured by Congress, state legislatures, or grassroots protest. Consistently, mainstream organizations devalued or rejected claims believed to threaten legal access, even if a particular argument would more likely resonate with the movement's base or better reflect activists' fundamental principles. Privileging legal rights encouraged activists to prioritize strategies that would pay dividends in the short term, even if those tactics strengthened the hand of the antiabortion movement in the longer term. For example, to forestall a threat to legal access, leading activists worked to play down arguments that might otherwise have helped to de-stigmatize abortion or capture the emotional experiences of women who chose the procedure.

In this way, the story of reproductive politics in the 1980s and 1990s suggests that rights-claiming can moderate movement demands even when activists no longer focus on litigation. Commentators often argue that constitutionalizing an issue makes movement members overcautious, unwilling to put at risk a precious and hard-won right.<sup>297</sup> Supporters of reproductive liberty exhibited the same aversion to risk when many expected the courts to abandon the cause and planned for the de-constitutionalization of the issue. Nonetheless, movement leaders sometimes sacrificed strategies and arguments thought to conflict with activists' longstanding commitment to legal access. This history suggests that the moderating effect of the law on those seeking social change is even more unpredictable and context dependent than scholars have recognized.

Studying the benefits of rights-claiming from the inside out can provide new insight about how change agents themselves understand the value of constitutional discourse. An inside-out analysis reminds us of the importance of intra-movement conflict about what rights mean and whether activists should rely on them. But the value of understanding debates about constitutional discourse runs both ways. While the history of movement debates about constitutional discourse offer scholars new perspectives on when, how, and why activists turn to rights talk, scholars writing in a variety of disciplines have illuminated the tradeoffs that have defined rights-claiming in the past. Through dialogue of this kind, both scholars and movement leaders might forge a more

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297. See, e.g., West, *supra* note 273, at 1400-01.

nanced and comprehensive view of when rights discourse helps those seeking to transform the larger society.

### CONCLUSION

The story of battles about rights-claiming within the movement for reproductive liberty is ultimately paradoxical. Rights talk created a common language for movement members with dramatically different ideas about strategy and even fundamental values. Constitutional discourse proved surprisingly and consistently malleable, as activists projected a rich array of shifting meanings onto a single fundamental right. At the same time, by focusing on legal access, movement leaders pushed below the surface arguments and tactics that threatened the status quo activists battled to preserve.

Perhaps the most provocative question posed by this history involves the efficacy of the rights discourse feminists deployed. The materials here remind us that the value of rights-claiming depends on more than the success or failure of a movement's legislative aims. To be sure, feminists had mixed results when using constitutional discourse to seek political change, losing some legislative fights and winning others, influencing some national elections while others slipped out of reach. But the costs and benefits of a reliance on rights rhetoric cannot be measured by looking at discrete legal changes. Instead, as the history presented here makes clear, constitutional discourse can both serve as a vehicle for a dizzying array of bold claims and obscure alternative visions for a movement's future.

Finally, recovering internal debates about the reasons for rights-claiming can help us better understand not only the contradictions of rights argumentation but also the vision of reproductive justice movement members unsuccessfully championed as an alternative to one centered on the Constitution. Such an approach posed a fundamental challenge to existing ideas about the morality of abortion and the competence and ethics of women. As commentators seek a path away from rights talk to a more comprehensive idea of reproductive justice, we would do well to remember those in the past who fought for the same thing.