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BELONGING BEYOND RIGHTS: COMMUNITY, INEQUALITY AND THE PUBLIC

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To my parents, Juan Pablo Niedmann Espinosa and Marcela Álvarez Del Canto.

Without their unconditional love, the person I am and this project would not have been possible.

"But the status of freedom did not follow automatically upon the act of liberation. Freedom needed, in addition to mere liberation, the company of other men who were in the same state, and it needed a common public space to meet them—a politically organized world, in other words, into which each of the free men could insert himself by word and deed."

—Hannah Arendt, *Between Past and Future: What is Freedom?*, 1961

TABLE OF CONTENTS

LIST OF FIGURES

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INTRODUCTION

The works that fill the following pages are the result of an unlikely series of events. Their connections, convergences, and dissonances are better understood in this light: as the result of a serendipitous research agenda that came out of my experience as an alien in the United States. In intentional and unintentional ways, the pages that follow are marked by foreignness. That is, by the tendency to look at common stories with unfamiliar eyes. Their perspective is both internal (in that it is one that strives to belong to the community it addresses), and external (in that the terms of that community are unfamiliar).

The papers that comprise this dissertation were simultaneously born out of this experience and shaped its outcomes. They are about Chile and the United States. But they are also about seeing from the outside and how denaturalizing concepts (be they indicators, systems, or demands) can illuminate alternative paths. The foreignness of "Imagining Development," "From the Rule of Law to a Rule of Rights" and "Feminism Without Roe" will hopefully serve as an entry into the contingency behind the forms they explore. In one way or another, they are structured around the questions that have come to define my research. While these works are a product of my J.S.D., they in no way reflect the entirety of the process. They are gathered here because they mark the end of a period. They synthesize a series of questions that others (I hope) can continue engaging with in future works.

The variety of topics and angles ought not to obscure the fact that all three papers explore a common set of questions on inequality, community, and forms. I hope reading them together

can help weave how from different thematic and even disciplinary confines, these papers deal with the ways in which "what we care about" is deeply conditioned by how we frame it.

Moreover, reading them as part of a unit may illuminate how thinking about the past, in terms of the past, can help us think about the present and its futures pasts.[1] In different ways, the three works compiled here explore the possibilities of foreign temporalities. While their focus is not historical time, in obvious and inadvertent ways, the works that follow are all ponderings about the past, the future and their presence in the present.

I. Threads: Inequality, Community and Forms

The dissertation explores the relation between inequality, community and forms. Underlying these threads is a concern with how we can live better lives. The question is intentionally posed in the plural as the dissertation ponders what it would mean to think about

[1] The works do not explicitly address the question of time but they are all concerned with the changing ways in which subjects experience it. That is, with how the past and the future appear in the present. In that sense they are all premised on the significance of the experience of time, what historian Reinhard Koselleck has described as the "space of experience" and "horizon of expectation" (256). Koselleck described the space of experience and the horizon of expectation as historical categories that constitute "dissimilar modes of existence" from whose tensions "something like historical time can be inferred" (256). For him, "experience is present past, whose events have been incorporated and can be remembered," (259) [1] including both unconscious memories and conscious recollections of the past. It is not limited to personal experience but comprises alien experiences that can be "conveyed by generations or institutions" (259). Experience is not the same as past events because past events may have occurred at a given moment, "but the experiences which are based upon them can change over time"[1] (262). Experience involves our relation to past events, our forms of processing, and opening perspectives from those events. Expectation, on the other hand, is "the future made present; it directs itself to the not-yet, to the non-experienced, to that which is to be revealed"[1] (259). Expectation is the horizon of possibilities, not directly derived from experience but not completely independent of it. It is the way in which we open up the possibilities of future, or, in other words, how we relate in present time to what is to come. Both the space of experience (past) and the horizon of expectation (future) are centered on the present but are "of different orders"[1] (259) because "the presence of the past is distinct from the presence of the future" (260). Unlike the past, the future "confronts an absolute limit, for it cannot be experienced" (261) so our relations to it materialize in the form of possible yet uncertain prognoses. See Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time*, trans. with an introduction by Keith Tribe (Columbia University Press, 2004).

ourselves as more than a sum of individuals. It does so not by directly addressing the question of how can we live better lives, but by exploring what better lives can mean or how to go about their search. Thereof, thematizing inequality and community responds to a need to think about the ways people live together and what that entails of our societies.

The question of forms analytically undergirds both inequality and community. It is the conceptual window through which the following pages explore them. In the end, the three chapters are attempts at imagining, or thinking of how to imagine, alternative forms of social organization in which we can live better. Read together, the papers suggest that inequality ought to be addressed as a structural phenomenon and that communities (not just individuals) matter. They argue that social problems require collective solutions, and that we ought to think of ourselves not just as a sum of individuals with rights but also as members of a community (or many) whose lives are inextricably connected and dependent upon our group.

Inequality is not a foreign concept. But the papers address it from a foreign perspective. Every country processes and imagines its inequalities differently. The role of community, and its extent, are foreign in the same way. Both manifest and depend on concrete historical conditions. Broadly speaking, in Chile inequality is primarily uttered in terms of class in the aftermath of the dictatorship. In the United States, it is preeminently conceived in terms of race as a legacy of slavery. To be sure, both inequalities (and many more) are present in both contexts. Moreover, they often overlap. Still, they inhabit the political imaginary differently and it is that difference that informs this work's perspective.

Communities are not necessarily foreign either. The role of communities on both contexts is complex and resists a simple and schematic description. But schemas aside, the plasticity of

communities and the different sites in which they appeared through my experience as an alien in the United States, fueled my sense of their contingency. For instance, the ability of people in the United States to build communities in new places, as they moved across the country seemed notable and particular to the American conditions. My experience in Chile, in contrast, was very marked by one's belonging (or not) to the metropole. Moving to a different city was far less common and consisted mostly of people moving to my hometown Santiago. In the same way many other forms of community; extended families, political groups, neighborhoods and educational communities while nominally the same in both contexts were materially quite different.

I approached these differences by thinking about how forms (and institutions) relate to the political imaginaries they braced. For instance, gender inequality in Chile is primarily articulated as a social problem that needs social redress. Governmental intervention often focuses on redistributing the cost of the care labor women overwhelmingly undertake.[2] Abortion was only recently decriminalized, and only under three circumstances (danger to the pregnant women's life, fetal incompatibility with life and pregnancies that result from rape).[3] In the United States, in contrast, gender inequality is more often discussed in terms of choice and individual

[2] During the COVID pandemic for example, several laws were passed with bi-partisan support to extend the 24-week paid parental leave by 60 days (Ley 20.545, 21.247 and 21.351). Similarly, unpaid domestic and care work figure often in Chilean news media and government guides as feminist issues. For instance: "Siete de 10 Mujeres Que Trabajan Realizan Labores Domésticas y Cuidados No Remunerados | Diario Financiero," accessed August 3, 2023, https://www.df.cl/economia-y-politica/laboral-personas/siete-de-10-mujeres-que-trabajan-realizan-labores-domesticas-y-cuidados; Paula Poblete, "¿Quién definió que las labores domésticas y de cuidado no son trabajo?," *CIPER Chile* (blog), March 23, 2020, https://www.ciperchile.cl/2020/03/23/quien-definio-que-las-labores-domesticas-y-de-cuidado-no-son-trabajo/; Ministerio de la Mujer y la Equidad de Género, "Guia Corresponsabilidad," 2020, https://minmujeryeg.gob.cl/wp-content/uploads/2020/11/GUIA-CORRESPONSABILIDAD.pdf.

[3] The law that decriminalized abortion in the three aforementioned cases was promulgated in 2017, *Ley 21.030*.

freedom, paradigmatically condensed in the discussion of abortion access.[4] Whereas the papers do not directly compare the political imaginary of both contexts, the sense of foreignness born out of their contrast is in the backdrop of each piece. In part, the unfamiliar imaginaries could be approached through the forms that sustained them.

As a theoretical matter, this developed into a commitment to the analysis of forms. The principle that articulates this work is that form –as opposed to substance— is immensely significant for our normative, and hence, our social world. Naturally, the premise is not that substance is unimportant. Rather, it is that paying attention to forms may uncover significant aspects about our social world that often escape our radar. The idea of forms is derived in this context from the discussion in jurisprudence between *ius* positivism and *ius* naturalism in which the question of what is, and what counts as, a legal norm, is paramount.[5]

This approach was born out of a growing obsession with institutional contours and processes that came to define my questions. Before focusing on forms, the separation of form and substance seemed to me intuitively unproblematic. Forms, whether formalities, framings or institutions, were the vases that held what was substantial, whether actions, expectations, or practices. But in the context of law, the separation suddenly appeared far less natural. Forms not only held so-called substances but distinctly shaped and delimited the contours of that which

[4] Specially since the Supreme Court overturned *Roe* and *Casey* in *Dobbs*, abortion receives significant news coverage from both advocates and detractors. For those who defend women's right to choose, despite's Reproductive Justice's objections, abortion is commonly depicted (if unintentionally) as *the* feminist issue. For example, Jessica Valenti's daily newsletter, "Abortion Everyday" features amongst its praises "Her newsletters is a powerful corrective to the misogyny of America" (Lyz, "Men Yell at Me" substack. See Jessica Valenti, "Abortion, Every Day | Jessica Valenti | Substack," August 3, 2023, https://jessica.substack.com/.

[5] See the discussion between H.L.A. Hart and Ronald Dworkin: H. L. A. Hart, *The Concept of Law*, Third Edition (Oxford University Press, 2012); Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986). Also, see John R. Searle, *The Construction of Social Reality* (Simon and Schuster, 2010), especially institutional facts.

they sustained. In short, the focus on forms derives from the conviction that the what is inseparable from the how. My dissertation is the result of an exploration of conditions of structural inequality and the role of community through the power of forms. It ponders on the possibilities that different iterations of an issue open and foreclose.

The project started out as a reflection on a case study with these themes in mind. The initial impulse, which ultimately materialized in the third and most matured paper of the series, interrogated *Roe v. Wade* and what framing the abortion question through a judicial lens implied. In that context, I began to think about the possibilities of law's many tools not just as secondary to the outcomes I envisioned but as a constitutive part of them. The products that resulted probed that intuition in three different but related settings.

II. Imagining Development

The first paper, "Imagining Development: The Chilean Dictatorship and the Case for Political Freedom as a Factor in the Human Development Index," was initially conceived in the context of my LL.M. The paper addresses the capabilities approach and the literature on the Human Development Report (HDR) and Index (HDI) to think through the possibilities and shortcomings of the index's indicators. It argues for the incorporation of a political freedom measure to the Index or that, at least, the Report ought to be reconsidered to underscore the importance of collective capabilities. To do so, it uses the Pinochet dictatorship to illustrate how atrocious violations of political freedoms can be perfectly compatible with a high score on the HDI and what that implies for our ideas of development.

The article advances two related claims. First, it argues that the relation between form and substance is particularly tight-knitted in the context of economic measures such as the HDI (and the HDR). Second, it argues that political freedoms constitute a uniquely collective capability that ought to be included in the report to highlight the significance of community in people's lives. By way of implication, it suggests that the absence of a collective capability signals a vision of human development so incomplete as to become erroneous by failing to acknowledge our gregarious nature, a theme that appears repeatedly through the dissertation.

The first claim of "Imagining Development" is that in the context of the HDI and the HDR, the indicators (that is, the measures devised as proxies to a particular variable), in part, constitute the variables they aim to reflect. Each variable, in turn, accounts for a part of "that which-we-care-about." For example, measuring schooling years accounts for the process of education and the presence of education in people's life. Thus, the paper explores the ways in which a formal category, economic indicators such as those that constitute human development measures, relates to the "substance" the indicator attempts to reflect. Implicit in this argument is a more nuanced line between form and substance. It holds that what counts as the proxy for what we care about (the form) partially becomes that what-we-care-about (the substance), making the distinction between the two much softer and the continuities among them more fluid.

The HDR is a fertile example to investigate these questions because of the significant role it has had in changing the paradigm of development. The HDR was the result of a philosophical questioning of the equation of economic growth with development. Critics first argued that without an account for distribution, any idea of development was irremediably lacking. But the capabilities approach went further, questioning the very premise of the measure: that wealth

equals development. In contrast to the traditional economic view reliant on growth alone, the HDR advances a more holistic approach to human development and asks what kinds of choices people can make. Material plenty thus becomes a function of human realization in that the availability of health, education, and gender equity, among others, enable individuals to pursue their aspirations and deploy their capabilities.

The second claim the paper makes, that political freedom ought to be incorporated into the HDI, stresses the third aspect that resurfaces in different ways throughout the following papers: community. The paper uses the Chilean dictatorship as a case study to show that without accounting for political freedom, our understanding of development falls shamefully short. But what is particularly significant about a political freedom indicator, the paper argues, is that it would be the only capability that is necessarily collective. Political action, and freedom, requires a distinctively public domain, a shared space of deliberation.

Whereas the idea of development is problematic in so far as it suggests a linear movement, it remains a powerful tool to make otherwise incommensurable realities comparable to each other. That readability need not pay the price of a static or linear notion of progress that obscures how communities can follow different trajectories if the indicators remain capacious enough to fit many versions of "development." Of course, setting indicators means committing to aspects of "what we care about" and endowing them with a particular value. The argument that "Imagining Development" pushes forward defends democratic rule as a qualitatively superior form of government. Acknowledging that judgment calls are involved all throughout the process of creating a development measure is a necessary step we should not shy away from. The political weight of that decision ought not to be covered by its technical implementation.

However, our judgment need only be one of minimum shared standards. Within the bounds of democratic rule, for instance, countless versions of government forms can be accommodated.

Biographically, "Imagining Development" represents a conscious departure from the common sense that abounded as I was coming of age in Chile by reflecting on the contrast between (the most optimistic reading of) the dictatorship's economic indicators and its oppressive secret police operations. While implicit, the experience of time is an important theme of "Imagining Development". The wound the dictatorship left in Chile was only beginning to take form as a collective historical experience as I was growing up in the 1990s. Our national focus was set on the possibilities of the future, and to hoping they would be as removed as possible from our past.[6] That state of affairs was drastically altered in the past couple of decades as the positive economic indicators ceased to satisfy the nation's political longings.[7]

It is no coincidence that as I was revising "Imagining Development" as a personal quest to reflect on the wounds of my country's past, protests were erupting all across the country demanding dignity (*dignidad*) for all. My interest in my country's trajectory coincided with a more generalized national questioning of the nation's status and institutions. If in a different format, I was one among millions of Chileans probing the terms of development we had inherited.

[6] See Tomás Moulian, "A Time of Forgetting The Myths of the Chilean Transition," *NACLA Report on the Americas* 32, no. 2 (September 1998): 16–22, https://doi.org/10.1080/10714839.1998.11722745.
[7] Most notably, with the wave of protests that erupted on October 18, 2019 whose consequences continues to develop. See "Chile Protests: Cost of Living Protests Take Deadly Toll," *BBC News*, October 20, 2019, sec. Latin America & Caribbean, https://www.bbc.com/news/world-latin-america-50119649; "Chile Starts Second Attempt to Draft New Constitution | Reuters," accessed August 8, 2023, https://www.reuters.com/world/americas/chile-starts-second-attempt-draft-new-constitution-2023-03-06/.

The Chilean relationship to the dictatorship and to its recent transitional period are undergoing a process of reconstruction. Recently, the upcoming commemoration of the 50th year since the military *coup* has sparked national conversations about the past and its presence in the present. The radical transformation of my home country's self-image that began with the 2019 protests, inadvertently influenced the scope and framework of my research. This initial turn to the past, or, to our political space of experience, marked the first milestone in my research route as I realized I was interested in the particular ways in which institutions and processes materially existed.

While the paper makes the modest intervention of suggesting to incorporate political freedom into the HDR due to its significance as a collective capability, the reasoning it proposes could further be explored to question the very basis of the index: the individual. Of course, individuals are important and human realization and development should remain as crucial features of "what we care about" when we ask how a certain country is doing. But a further line of exploration could be precisely what would it mean to take seriously the fact that people cannot live without a community. At the very least, we need to be cared for by others in our early years and, in a panoply of ways, rely on others all throughout our lives. Does this mean that our frames should move from the individual to the collective? Perhaps not. But our reflection on the role of forms and their implications should at least be mindful of the indispensable and complex interactions between subject and community formation. In part, the ways structures deal with that relation is what the second paper of this body ponders.

III. From a Rule of Law to a Rule of Rights

The second paper of the series argues that we have transited from what was originally conceived as a rule of law onto a rule of rights. By arguing that we have transited into a new legal structure, the paper reflects on the ways in which institutional arrangements embody and express political ideals.

During the twentieth century, there was a marked increase in the kinds of controls judges could exert over the decisions of other branches, as well as in their use of the authority to do so. Across latitudes and longitudes, after World War II, individual rights became politically more precious, and judges increasingly trusted with their guardship. Whereas the task was not new, the degree and intensity with which justices exerted their power to limit other branches' actions in defense of rights were unprecedented, as legal scholars and political scientists have aptly shown.[8] The paper builds on the work of scholars who have extensively documented the increase of judicial control to reflect on one of the less examined implications of this trend: its privatizing syntax.

Like "Imagining Development" "From a Rule of Law to a Rule of Rights" analyses what it means to imagine ourselves almost exclusively as individuals as opposed to (members of) a community. In contrast to "Imagining Development", however, it is concerned with the particular ways in which institutions operate together and the meanings that result from their interaction.

[8] See for example Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge: Cambridge University Press, 2016); Björn Dressel, ed., *The Judicialization of Politics in Asia* (New York: Routledge); Arthur Dyevre, "Technocracy and Distrust: Revisiting the Rationale for Constitutional Review," *International Journal of Constitutional Law* 13, no. 1 (January 1, 2015): 30–60; Tom Ginsburg, "The Global Spread of Constitutional Review," in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington (Oxford University Press, 2008); Doreen Lustig and J H H Weiler, "Judicial Review in the Contemporary World—Retrospective and Prospective," *International Journal of Constitutional Law* 16, no. 2 (June 15, 2018): 315–72; Rachel Sieder, Line Schjolden, and Alan Angell, eds., *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan US, 2005).

Although its interest is more material than that of "Imagining Development" given that it is concerned with institutions, because its scope is global, it does not engage with cases in detail. The paper however offers a few examples of judicial interventions revising decisions from executive bodies at the local level in different jurisdictions, to illuminate how the kinds of questions judges ask in a rule of rights differ from those they ask in a rule of law. That way, without forsaking its general ambitions, the paper offers some texture on the judicial standards of the rule of rights.

"From the Rule of Law to a Rule of Rights" analyses broad transformations of institutional types rather than considering any particular case too closely. To that end, it surveys the ideals that historically undergirded the rule of law: the French *principe de légalité* and the German tradition of *Reechstaat*. Both traditions were heavily oriented towards the pursue of collective objectives under a stable framework of formal legal safeguards aimed at limiting otherwise uncontrolled power.[9] In the rule of law, the role of the judiciary was limited to that negative role –as a formal rather than substantial limitation— and was structurally subject to the pursue of collective goals (administering a political unit).

In contrast, the paper argues, the transformations that took place in the latter half of the twentieth century brought with them not merely a change in the kinds of grievances subjects could voice in courtrooms but in the very relation between communities and individuals through that space. That is not to say that the institutional promise of the rule of law as a political community united by law was ever fulfilled. Nor is the argument that we should return to a

[9] See Jacques Ziller, 'The Continental System of Administrative Legality', B. Guy Peters and Jon Pierre, eds., Handbook of Public Administration (London: SAGE, 2003); Jean-Jacques Rousseau, The Social Contract and The First and Second Discourses, Edited with an Introduction by Susann Dunn (New Haven: Yale University Press).

golden era of community reconciliation that was never true in practice. But it is the case, the paper argues, that the institutional focus has been deeply transformed in ways we have been unwarrantedly accepting of and that we should pay more attention to.

The comparison between the rule of law and the rule of rights is intended to show how institutional arrangements are structured to tend toward particular ends.[10] Whereas their aims are in part aspirational, they are also material. Legal institutions, to an important degree, set the terms through which we relate to and think about each other in a society. To that extent, the paper argues, the rule of rights consists of a privatization of our common worlds as it moves public disputes into the chambers of justices, institutionally inapt to confront a matter as a public question.

To a significant degree, the privatization of disputes is the product of the adversarial structure of the judicial forum. When seen as cases and controversies, matters are necessarily discussed in terms of private harm and interest. They are presented as an inevitable clash among opposed and pre-existing interests. There is little if not no space in the judicial arena to think about common problems and goals. The unprecedented rise of judicial supremacy thus is problematic because of the significant position this adversarial structure begins to occupy in our political imagination.[11]

[10] For a full development of the argument on the institutional significance of the distinction between legislator and judge see Fernando Atria, *La Forma Del Derecho*, 1st ed. (Marcial Pons, Ediciones Jurídicas y Sociales, 2016), https://doi.org/10.2307/jj.2321948.

[11] This process, I argue, operated similarly to the one described by Risa Goluboff in the case of civil rights with *Brown*, as the non-discrimination version of civil rights became the standard. In the case of the rule of rights the triumph of the judicial arena and rights language was in a way so successful that it took up all of the space. Thus, in the process other alternatives were obscured and the legal imagination became captive. See Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Massachusetts: Harvard University Press, 2010), esp. 14.

The judicialization of public disputes, the paper argues, erodes the public arena by particularizing and privatizing disputes that concern a community not merely as a sum of individuals but as a distinct form of common and related existence. Framing matters as individual rights' issues to be resolved by a judge, instead of collectively debating what it is a just society demands, transforms the syntax of public discussions into one of individual problems. Thus, the rule of rights obscures an essential aspect of our common existence trumping our political imagination by privatizing our common world.

The paper uses Arendt's concept of the public arena (as a shared space that "is common to all of us and distinguished from our privately owned place in it")[12] to reflect on the limitations of the rule of rights. At the backdrop of the reflection of the public, is the role of community in that space. Through the idea of a public sphere, the paper reflects on the implications and significance of the existence (and necessity of) a collective arena. Community is uttered in that space, that hosts something qualitatively different from the sum of its individuals. Thus, the importance of community and its relevance for our social worlds is thematized through the role of the public arena. In that sense the public appears in this context as a species of the genre community. The more general concept, community, encompasses all forms of collective existence. The role of the public was paramount to the questions the first two papers ask. Similarly, the third one begins from a related premise but looks into feminist activists' projects to survey the shifting roles of community structures within them.

[12] Hannah Arendt, Danielle Allen, and Margaret Canovan, *The Human Condition* (Chicago; London: University of Chicago Press, 2018), 52.

"Imagining Development" ponders on the significance of framing our aspirations in different ways, in the case of an economic indicator. "From the Rule of Law to a Rule of Rights" reflects on this same question but in the case of legal institutions, with a focus on the exponential growth of judicial power. Both reflect on questions about forms by interrogating how collective aspirations or ideas can fit their respective frameworks. The third paper resulted from a desire to prove these questions historically. Initially, the third paper was going to develop the thesis of "From the Rule of Law to a Rule of Rights" in the case of abortion in the United States. By focusing on an emblematic judicial decision, and how it affected the American political imagination the idea was to probe the rule of rights thesis through a case study. But as I moved deeper into the case, the role of the rights framework seemed more and more insufficient as an explanation.

IV. Feminism Without Roe

I started my research for the third paper by asking how *Roe* affected feminists' political imagination. By tracing how feminist discourses changed around *Roe*, I figured I would be able to hypothesize about the effects of framing a political aspiration in terms of rights. I was mostly interested in the question of rights and judicially enforceable rights in particular. The case seemed especially relevant in that it could help explain how the rise of an issue ("the abortion wars") resulted from overemphasizing the judicial arena.[13] But as I set foot on the archives, the

[13] To name a few works that emphasize the continued relevance of the "abortion wars" throughout the past couple of decades; Cynthia Gorney, *Articles of Faith*, 2000, https://www.simonandschuster.com/books/Articles-of-Faith/Cynthia-Gorney/9780684867472; Deana A. Rohlinger, "Friends and Foes: Media, Politics, and Tactics in the Abortion War," *Social Problems* 53, no. 4 (November 1, 2006): 537–61, https://doi.org/10.1525/sp.2006.53.4.537; Neal Devins, "How 'Planned Parenthood v. Casey' (Pretty Much) Settled the Abortion Wars," *The Yale Law Journal*

question became less one about rights as an abstract political discourse and more about the material ways and sites in which activists imagined, pre-figured, and contested the world they lived in.

Instead of the broad survey I first envisioned, I decided to focus on the largest feminist organization of the United States, the National Organization for Women (NOW), to be able to dive deeper into the particularities of the case. "Feminism without Roe" traces the changing significance of abortion within NOW, as a window into feminist activism at large. The focus on NOW represents a major shift in terms of scale with respect to the first two papers. By focusing on one organization, and situating it within a larger activist milieu, the paper explores the questions of (gender) inequality, framing and community in a more substantial way.

The paper argues that abortion was not the most significant demand for feminist activists when Roe was decided and that to the extent it was important, it was so in very different terms. It argues that the turn to a single issue was not merely the result of external pressures but the product of the internal realignment of NOW around the Equal Rights Amendment. When NOW focused its efforts on a single-issue with the ERA, the organization never returned to a multi-issue agenda. After the ERA's defeat, abortion came to occupy new-fangled single-issue vacancy the amendment left in the organization's agenda.

The paper suggests feminist activists during the 1960s and 1970s, before Roe became the foremost demand of the organization, articulated their hopes and aspirations in a myriad of ways.

118, no. 7 (2009): 1318–54; Linda Greenhouse and Reva B. Siegel, *Before Roe V. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court's Ruling*, 2nd edition (New Haven, Conn.: Yale Law Library, 2012); Charles C. Camosy, *Beyond the Abortion Wars: A Way Forward for a New Generation* (Wm. B. Eerdmans Publishing, 2015); Mary Ziegler, *Dollars for Life: The Anti-Abortion Movement and the Fall of the Republican Establishment* (New Haven, Connecticut: Yale University Press, 2022).

Among these were collective efforts in which community was an essential component. As activists took matters into their own hands in welfare groups, consciousness raising groups, letter campaigns, cooperative day-cares and women's health centers (and numerous other sites), questions about community and redistribution surfaced in every step. In that process, feminists experimented with different kinds of communities, and assigned everchanging roles to those communities as they strove to overcome patriarchal oppression. The distribution of reproductive labor, for instance, and the social value it represented was at the center of many of these efforts.[14] While several activists consciously explored those questions in position papers and conferences, many more experienced the challenges posed by a redistribution that challenged patriarchal rule in their everyday projects.[15] Feminists strove to overcome gender oppression and create a new world by doing so.

Inequality is thus articulated in "Feminism Without Roe" through activists' perspective during "feminist freedom" (the period that extended between the 1960s and 1970s) in which NOWers' political imagination had not yet concentrated almost exclusively in abortion. For feminists, gender inequality appeared in many forms and sites. It manifested differently across differences of class, race and ethnicity. The conjoint operation of those structures generated

[14] For example, in the case of the National Welfare Rights Organization how activists demanded the recognition of the social value of the care labor they performed. See Premilla Nadasen, *Welfare Warriors: The Welfare Rights Movement in the United States* (Routledge, 2005); Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America*, Illustrated edition (Philadelphia, Pa: University of Pennsylvania Press, 2007).

[15] For an overview of the feminist movement at the time and a description of the kinds of projects activists developed, see Kirsten Swinth, *Feminism's Forgotten Fight: The Unfinished Struggle for Work and Family* (Cambridge, MA: Harvard University Press, 2018).

forms of oppression that exceeded the sum of its parts.[16] These sites, the paper argues, were contested as activists strove to change the conditions of the world they lived in.

Feminists were in the business of changing structures. In so far as they were part of the structures they wanted to transform; the work required collective action to create new forms of relation from which new structures could rise. The paper illustrates this with the case of women's health groups and how they questioned the medical status-quo. Activists' efforts included rethinking the ways in which healthcare was provided by empowering women to actively participate in the process. Changing healthcare services included giving access for those who couldn't pay for it but also changing its paradigms. From women made anatomical guides, to collective cervical exploration sessions to self-health guides, activists were transforming the ways in which healthcare was imagined, created and provided.[17]

Like "From the Rule of Law to a Rule of Rights" "Feminism Without Roe" traces the ways in which a shift in how subjects conceive an issue radically transforms the very issue at stake. In the case of the rule of law, the analysis is institutional and reflects on the changing emphasis on rights and judicial enforcement by the legal system. In the case of feminist activists, the paper investigates how an increased focus on abortion overshadowed their attempts at structural transformations that had been so widespread during "feminist freedom." In both cases,

[16] The qualitatively distinct character of overlapping forms of oppression, and how their analysis required an intersectional approach was famously articulated by Kimberlé Crenshaw. See Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," n.d., 31.

[17] Like collective gynecological sessions, cervical explorations were usually performed in the presence of other women in small groups. See for example The Second Wave, 1973 cited in Kristen Grimstad and Susan Rennie, eds., *The New Woman's Survival Catalog,* 73, (New York, 1973).

the syntax of the political questions is transformed from one devoted to structures to one concerned with individual entitlements.

"Feminism Without Roe" may seem uncomfortable in a post-*Roe* world because it questions the centrality abortion has come to occupy within feminist activism. But that need not be the case. To be sure, the critique of abortion's significance as a stand-alone issue is not new. Since the mid-1990s, Reproductive Justice activists have pushed back against abortion-centric feminism and against a feminism narrowly understood as a matter of individual choice.[18]

But despite these efforts, abortion continues to stand as a metonymy for feminism in the United States. In other words, abortion's symbolic density has become so large that it occluded the myriad of aspirations that once surrounded and gave meaning to it. As abortion rose to represent feminist hopes in the United States, it inadvertently became virtually the whole extent of feminist ambitions in the American mainstream. "Feminism Without Roe" is not a critique of abortion activism nor of the momentous labor those who fight for women's basic reproductive freedom perform every day. In a post *Dobbs* America, that work is tremendously important. However, excessive attention to the abortion question alone obscures the complex and systemic ways in which gender oppression persists.

The story the paper recovers, instead, is about the past and its hidden possibilities. At the most elemental level it shows just how different feminist demands looked half a century ago. "Feminism Without Roe" exposes the rich ways in which abortion was articulated during feminist freedom and the capacious agenda that sustained it. The exercise of looking back into

[18] The critique was first made in terms of Reproductive Justice in 1994. For an overview of the movement's predicaments see: Loretta Ross and Rickie Solinger, *Reproductive Justice: An Introduction*, 2017.

feminists' former projects is not intended as one of political nostalgia but as a window into the many ways in which feminist demands can be articulated and the significance of an underlying burgeoning movement. Pointing to more capacious agendas that included abortion but were not limited to it is not a critique of abortion activism but an invitation to reimagine it, and feminist activism in general, within a new and larger array of aspirations. Learning from the possibilities of the past but imagining the infinite routes that can be built for the future. "Feminism Without Roe" is not an invitation to return to the past but one to seriously engage with the possible future. It is an invitation to look into the contingency of our present and imagine new ways for things to be not just modestly better but entirely different.

V. Analytical Patchwork: Community, Inequality and Forms

"Imagining Development" "From a Rule of Law to a Rule of Rights" and "Feminism Without Roe" survey the plasticity of inequality and community. They do so by addressing their forms in different contexts with a foreign perspective. They are about Chile and the United States, but could be posed anywhere. Because their focus in the end is the contingency of any historical reality, the ideas explored in this dissertation could be used to analyze the questions it addresses in several contexts. But the dissertation goes one step further. Taken as a unitary work, the three papers make the case that forms are key by exposing their significance in radically different contexts. The dissertation offers an analytical patchwork whose dissimilar patterns can illuminate how vital forms are for the ways in which inequality and community exist in the world.

The presence of the Chilean dictatorship, the 2019 protests and the current events of my homeland inextricably ground these pages. In the same way, the shifts in the abortion question and the care crisis that the COVID-19 pandemic exposed in the United States inevitably, if not always explicitly, inhabit these pages. Whereas the works that comprise the dissertation respond to the particular changes that exposed the contingency behind the forms the pieces here gathered grapple with, the argument they make can be more widely developed. By scrutinizing questions of form in other contexts, through what I have referred to as a foreign perspective, we can continue to imagine and create our world differently. To do so, the pieces also suggest, our relation to time is tremendously important.

The dissertation gauges with the question of time indirectly. All three papers are premised on the notion that the present is inevitably informed by the presence of the past (as a space of experience) and the future (as a horizon of expectation) within it.[19] The mutual presence of past and future in turn conditions the ways in which forms are constantly created and reinforced in the present.[20] Revisiting our pasts may thus illuminate hidden possibilities of experience that open up new paths in the present. Thinking about the past in its own terms (to the best of our abilities) enriches our understandings of the present by showing its contingency. Thus, the foreignness provided by comparing the past and the present offers an effective tool to observe the familiar with unfamiliar eyes.

[19] See Koselleck, *Futures Past*, *supra,* note 1.
[20] I assume Sewell's dynamic characterization of structure and the role of agents in its constant reinvention. See William H. Sewell, "A Theory of Structure: Duality, Agency, and Transformation," *American Journal of Sociology* 98, no. 1 (1992): 1–29.

The questions that sparked the papers that follow remain unresolved. While in many ways the dissertation I hereby present provides more questions than answers, I hope its intertwining threads can suggest routes forward, as we continue to seek for solutions to the problems that motivated them. The overlaps between the variety of topics and perspectives presented in this work ought to suggest common possibilities for future exploration. The foreign patchwork that follows, thus, ought to be read as an invitation to think about our present and its possible futures past. Hopefully, the shared concern of "Imagining Development" "From a Rule of Law to a Rule of Rights" and "Feminism Without Roe" with community, inequality, and forms can foreshadow new questions and paths. In that process, I hope they can contribute to the long process of figuring how to change our ways, and ourselves in the process.

I. IMAGINING DEVELOPMENT: THE CHILEAN DICTATORSHIP AND THE CASE FOR POLITICAL FREEDOM AS A FACTOR IN THE HUMAN DEVELOPMENT INDEX

Should political liberties be included in the Human Development Report? Their brief and controversial debut on the report between 1991 and 1993 seemed to close the door for political liberty measurements because of their technical difficulties. Yet, political freedoms seem to be ever more urgent capabilities. This paper intends to reopen the debate on whether political freedoms should be incorporated into the Human Development Report. It uses the Chilean dictatorship's example to reflect on how development is inevitably trumped without them. After briefly responding to some of the main criticisms political freedoms measurements have encompassed the paper proposes an additional reason to incorporate them: they portray the only truly collective capability, representing an essential aspect of human existence which is now absent from the Report.

1. Introduction

The purpose of this paper is to reinvigorate the debate over the inclusion of a political freedom measurement on the Human Development Index, or, at least, the Human Development Report. I will use the Chilean dictatorship as a case study to identify political freedoms without which development is irremediably lacking.[1] By exploring the dictatorship's most salient political deprivations I expect to shed a light over what political liberties can report to human life. By political liberty or freedom, I refer to those features of participation in the public life that

[1] This task should be continued on future works by analyzing different cases, a story similar to the one I will observe through this paper can be told for example about México. See Peter Smith, "Mexico Since 1946: Dynamics of an Authoritarian Regime," in *Mexico since Independence*, ed. Leslie Bethell (Cambridge University Press, 1991), 321–95.

were abridged by Pinochet's regime. Their identification will be negative because on this matter "avoiding the bad is inseparable, conceptually and pragmatically, from […] pursuing the good."[2]

The reflection will be framed within the Capabilities Approach literature and, particularly Martha Nussbaum's and Amartya Sen's work. I will argue that political liberties are especially significant because they represent a collective capability. I in no way intend to deny the existence of other relevant capabilities which may be currently omitted from the Human Development Index and Report, but rather to provide a concrete example that reflects the specially pressing importance of political freedom for development and its measurement (or what we should care about when we are trying to quantify development).

2. The Chilean Dictatorship

Augusto Pinochet Ugarte claimed he had taken Chile away from the abyss it was standing on in 1973 (unintentionally graphical, in his words, the country had "taken a step forward"). He ruled Chile from 1973 to 1990. Throughout his regime, Chile had overall positive economic figures. The gross internal product grew at a yearly average of 2.9% and the inherited super-inflation diminished.[3] Although the economy faced two deep crises in 1975–1976 and 1982–1985, considered on the aggregate they did not overturn the positive macro-economic figures.[4]

[2] Martha C. Nussbaum, "Introduction: Aspiration and the Capabilities List," *Journal of Human Development and Capabilities* 17, no. 3 (July 2, 2016): 302, https://doi.org/10.1080/19452829.2016.1200789.
[3] Ricardo Ffrench-Davis, "Chile, Entre El Neoliberalismo y El Crecimiento Con Equidad," *Nueva Sociedad* 183 (2003): 70–90.
[4] V. Espinoza, E. Barozet, and ML. Mendez, "'Estratificación y Movilidad Social Bajo Un Modelo Neoliberal: El Caso de Chile.,'" *Lavboratorio*, no. 25 (2013): 171.

Part of the myth of Pinochet's dictatorship in Chile has rested on the assumption that the regime's economic figures (portrayed by the country's economic growth) were synonymous of development. And development was a success.[5] A closer look at the Chilean history though offers a much darker chronicle.

2.1. Context and Economic Indicators

Augusto Pinochet Ugarte attained office in La Moneda (Chile's presidential house), after leading the military coup to terminate the democratically-elected socialist president Salvador Allende Gossens' mandate. After seizing La Moneda, the Military Junta started governing the country. Immediately after the coup, Pinochet was appointed president of the Junta, on his role as Commander in Chief of the military force.[6]

The alleged goal of the military government was to liberate the country from the "Marxist monster" of which it was a hostage. In this context, the use of force was not only an acceptable but rather a necessary mean to save Chile. In the words of one of the dictatorship's most prominent ideologues, Jaime Guzmán:

> The success of the Junta is directly linked to its harshness and decisiveness, which the country expects and applauds. Any complexes or hesitance in this purpose would be disastrous. The

[5] It is worth noting though that despite the economic growth and diminishment of poverty, inequality within the country augmented during the military dictatorship so even in economic terms the Chilean experience had strains, see D. Contreras, "Pobreza y Desigualdad En Chile: 1987-1992. Discurso, Metodología y Evidencia Empírica.," *Estudios Públicos* 64 (1996): 57–94.

[6] Ascanio Cavallo, Oscar Sepúlveda Pacheco, and Manuel Salazar Salvo, *La historia oculta del regimen militar: Chile 1973-1988*, 1a ed (Santiago: Grupo Grijalbo-Mondadori, 1997).The *Junta* was constituted by the four Commanders in chief of the armed forces: navy, air force, police and military. The *Junta*'s original intention was to be the country's power center as a collegiate body. Future, however, provided differently "because the navy and the air force did not have enough personnel to assume all the necessary functions, and because General Pinochet was determined to impose his authority and power quickly, which were strengthened by the army's larger size" Carlos Huneeus, "The Pinochet Regime," in *The Pinochet Regime*, trans. Lake Sagaris (Lynne Rienner Publishers, 2007), https://doi.org/10.1515/9781626371583.

> country knows that it is dealing with a dictatorship and it accepts that. It only demands that it rules with justice and without arbitrariness […]. Turning the dictatorship into a "dictablanda" would be an error with unforeseeable consequences. It is precisely what Marxism is waiting for, in the shadows.[7]

When the Junta took office, Chile was swept into a severe economic crisis. Allende's regime had reached a hyper-inflation of 600% by the end of 1973.[8] In terms of production, during the Unidad Popular's government—Allende's political coalition—Chile's growth was negative, the average rate was of −4.2% between 1970 and 1973.[9] The military government held that the only way to recover economic equilibria was to leave the market to operate in absolute freedom.[10] Thereof, the military Junta implemented numerous liberalizing policies in pursuit of its objective, amongst the most relevant: liberalization of financial markets, termination of price control schemes, elimination of importation and exportation duties, reduction of the public sector and a tax cuts (73). These policies had positive results and Chile's macro-economic figures began to improve. For instance, as of the year 1974 inflation had decreased to 370% and the country had achieved between 1974 and 1981 a positive average growth of 3.3%.[11] Nevertheless, the evaluation of Chile's economic performance over the years that followed the coup has not been exempt from controversy.[12] Notwithstanding the variety of positions, it has been

[7] The quote was taken from Huneeus, 182-183, "The Pinochet Regime." Dictablanda is an invented figure which denotes "soft dictatorship" as the term is construed by the combination of "dicta" but instead of "dura" (which literally means hard or harsh), it incorporates the word "blanda" which means soft. The word became somewhat popular in Chilean far-right conservative circles were Pinochet's dictatorship has been referred to as dictablanda instead of dictadura.
[8] Ffrench-Davis, 71, "Chile, Entre El Neoliberalismo y El Crecimiento Con Equidad."
[9] Ffrench-Davis, 73.
[10] Espinoza, Barozet, and Mendez, "'Estratificación y Movilidad Social Bajo Un Modelo Neoliberal: El Caso de Chile.'"
[11] Ffrench-Davis, "Chile, Entre El Neoliberalismo y El Crecimiento Con Equidad"; Ricardo Ffrench-Davis, 71 and Barbara Stallings, *Reformas, crecimiento y políticas sociales en Chile desde 1973* (Lom Ediciones, 2001), 46.
[12] For a description and evaluation of the economic policies implemented by the dictatorship, see Arnold C. Harberger, "The Chilean Economy in the 1970s: Crisis, Stabilization, Liberalization, Reform," *Carnegie-Rochester*

characterized at least by some as a period of economic success.[13] The evaluation of such "success", of course, is heavily dependent upon the factors considered and the relative weight placed upon each.

Still, for the sake of the argument, we will presume the most "optimistic" readings to be correct, in order to test our claim against the best possible version of the dispute between pure economic factors versus non-economic factors, and, particularly, democracy. As we have anticipated, even if we accept the most charitable readings of the Chilean economic situation, the overall scenery was no bed of roses. Under the encouraging economic figures laid a country imprisoned in terror.

2.2. Political Curtailment

To understand the extent to which speaking about development during the Chilean dictatorship is an oxymoron we will summarily describe some of the main aspects of the Chilean political life of the period. As Pinochet seized power, the executive and legislative branches of the state were concentrated in one, under the command of Pinochet. With the shutting down of Congress, the military dictatorship promulgated decretos leyes, decrees that emanated directly from the president which were considered to have legal range. There were no elected officials, there was no Congress, no mayors, no elected city council and even the student representatives

Conference Series on Public Policy 17 (January 1, 1982): 115–52, https://doi.org/10.1016/0167-2231(82)90040-9; Juan Foxley R., "Determinantes Economicos Del Ahorro Nacional: Chile 1963 - 1983," *Cuadernos de Economía* 23, no. 68 (1986): 119–27; Vittorio Corbo, "Reforms and Macroeconomic Adjustments in Chile during 1974–1984," *World Development* 13, no. 8 (August 1, 1985): 893–916, https://doi.org/10.1016/0305-750X(85)90074-9.

[13] Vittorio Corbo and Stanley Fischer, "Lessons from the Chilean Stabilization and Recovery," 1993.

inside higher education institutions were designated by the authorities.[14] In short, representation and politics had been banned from Chilean's daily life, who in addition to the former restrictions were subject to a military curfew.

The regime's interference in higher education institutions was diverse and penetrating. The first intervention occurred on the day of the coup. Army officers entered several campuses of Universidad de Chile and detained hundreds of professors and students who militated or sympathized with Allende's Unidad Popular.[15] Then, on 3 October 1973, barely 22 days after the coup the Junta issued the first official and public order aimed at higher education through which it declared the Junta would delegate deans in each one of the country's universities.[16] The deans had the power to manage the university's personnel, including faculty members. They controlled their remuneration and had the authority to modify, terminate or otherwise alter a professor's contract in any way they saw fit.[17] In addition to these measures, starting on 1973 the military government shut down several academic units considered "dangerous," among them, for instance: the Center for Socioeconomic Studies, the Center for Mathematic and Statistical Studies, the Department of Slavic Languages and the Economic History Unit of the History Department.[18] Any kind of political activity inside the universities was actively repressed and the years that followed the coup were marked by a series of punitive actions and ideological

[14] Pablo Toro, "La Razón 'Dedocrática': Una Mirada a La Doctrina y Praxis de La Representación Oficialista En La Universidad de Chile, 1974-1979"," *Pensamiento Crítico*, no. 2 (2002).
[15] J. Errázuriz, "'Intervención y Depuración En La Universidad de Chile, 1973-1976. Un Cambio Radical En El Concepto de Universidad.,'" *Nuevo Mundo Mundos Nuevos*, n.d., https://doi.org/doi:10.4000/nuevomundo.70688.
[16] Errázuriz; Paul P. Meyers, "La Intervención Militar de Las Universidades Chilenas," *Revista Mensaje*, no. 24 (1975): 380–84.
[17] Meyers, 380, "La Intervención Militar de Las Universidades Chilenas."
[18] J.J. Brunner, "Informe Sobre La Educación Superior En Chile" (Santiago de Chile: FLACSO, 1986).

depuration in the area of higher education.[19] There was no guaranteed freedom of speech and the regime was extremely zealous of its self-attributed control prerogatives. Of course, the speech was not only marginalized and prosecuted within higher education institutions. In fact, Pinochet's regime took active institutionalized measures to persecute dissident (or even suspect dissident) speech everywhere. In 1973, the regime created a secret police agency, the Dirección de Inteligencia Nacional (DINA) which prosecuted, tortured, executed or disappeared thousands of Chilean citizens which had been affiliated or suspected to be affiliated with the Unidad Popular. The DINA was active until 1977 when it was replaced by the Comisión Nacional de Inteligencia (CNI), which remained active until 1989.[20] The DINA and its successor, the CNI, operated secret detention centres where they carried victims selected by their intelligence units to be tortured and interrogated (23). Its brutal modus operandi included falsely denying arrests or claiming releases of victims that came to be known as detenidos desaparecidos (disappeared prisoners).

The *detenidos desaparecidos* were:

> Those who were arrested by government agents or by persons in their service and about whom the last information is that they were apprehended or that they were seen later in a secret prison. Officials denied having arrested them, claimed to have freed them after a certain period of time, offering other unsatisfactory explanations, or simply saying nothing (51–52).

The fraudulent masking of the DINA's and CNI's method derived on a Kafkian tragedy for the lives of the *detenidos desaparecidos'* families, whom incessantly but in vain sought to

[19] Toro, "La Razón 'Dedocrática': Una Mirada a La Doctrina y Praxis de La Representación Oficialista En La Universidad de Chile, 1974-1979," 15.
[20] *Comisión Nacional de Verdad y Reconciliación* "Chilean National Commission on Truth and Reconciliation." (Notre Dame: University of Notre Dame Press, 1993).

discover the whereabouts of their loved ones. The police's mercilessness went even further. In several cases, policemen either actively affirmed or implied that the detenido desaparecido was missing because he (or she) had voluntarily abandoned his (or her) family.[21]

According to the most comprehensive revision of the available sources, recollected in the Report of the Chilean Commission of Truth and Reconciliation, 2.279 people were killed by the regime. Of those, 957 are considered detenidos desaparecidos.[22] From the total number of fatal victims of the regime (from which not all belong to the category of detenidos desaparecidos), the circumstances of the death of 1.322 were determined.[23] The other 957 remain undetermined and the mourning of their families is kept captive of the anguish of uncertainty. The stress over this uncertainty is augmented by the abhorrent possibilities that surround the victim's last days. A separate source of distress is the number of bodies that "disappeared in such a fashion that many have been impossible to locate."

Pinochet's regime violation of the human rights record is far more extended than the violence performed over the fatal victims. A total of 27.255 people were non-lethal victims of political imprisonment, 94% of them were subject to torture.[24]. To be clear, the fatal victims

[21] For instance, one testimony explained that: "When I felt so many people rejecting me or not understanding, I preferred to keep quiet. I was ashamed to face reality. I didn't know how to answer where my father was. *I wasn't sure whether he was dead or had abandoned us*" Phillip Berryman, trans., *Report of the Chilean National Commission on Truth and Reconciliation* (Notre Dame: University of Notre Dame Press, 1993), 1009.

[22] Berryman, 1022. The website of the Museum of Memory offers a complete and updated list of those who are recognised as *detenidos desaparecidos*. Available at: interactivos.museodelamemoria.cl/victimas/?s=&cat=6®ion=0&calificacion=0&militancia=0&year2=0 [Accessed March 11, 2020].

[23] The specific circumstances were that 59 died by the order of war tribunals, 93 during protests, 101 during alleged escape attempts, 815 through other kinds of executions or death by torture, 87 were killed by political violence on 1973, 38 during protests, 39 during gun battles and 90 by politically motivated violence form private citizens, Berryman, 1123).

[24] Comisión Nacional Sobre Prisión Política y Tortura, "Informe Nacional Sobre Prisión Política y Tortura" (Santiago de Chile: La Nación, 2005), 82.

were subject to torture too, but the recollection of specific data of those who survived is more detailed for obvious reasons. To familiarize you to the nightmare the victims and their families experienced suffice it to say that some of the tortures included the introduction of spiders through the victim's vagina or anus, asphyxiation, submerging the victims under water with excrements for prolonged periods—to simulate drowning-, use of electroshock, all kinds of sexual abuse including rape by police agents and rape by dogs that had been specially trained to that effect (245). The cruelty of the regime's treatment of political dissidents paired with the obscurity—and frank deceit—with which it addressed the matter, hurt the tissues of the public imaginary severely. A massive yet unassailable wound was perpetrated to the Chilean pueblo which is still struggling to attain the episode into its memory.[25]

3. Measuring Development

The description of the dreadful panorama of the political life during the Chilean dictatorship offers a glimpse on the economic indicator's incapability to grasp this crucial aspect of development that should be considered in answering the question "how is X country doing?" Economic factors are incapable by themselves of reflecting the decisive features of a country's circumstances for human welfare. Think of the contrast between the Chilean political reality and

[25] Pueblo may be translated as "the people" or "body politic". The richness of the Spanish term lies in the conjunct evocation of both of these aspects in one word. Pueblo is inevitably a collective description, referred to the political body (as in "We the people") or the non-economically favoured mass (equivalent to the English phrase "the common people"). But unlike the term "people," the word *pueblo* can never mean the plural of person as a sum of unrelated people. It inevitably involves a sense of unity be it cultural, economic or political.On memory and the Chilean dictatorship see Isabel Piper, "Obstinaciones de La Memoria: La Dictadura Militar Chilena En Las Tramas Del Recuerdo," 2005..

the positive economic figures. Growth alone is an extremely insufficient tool to asses a population's well-being, even if corrected by distribution.[26]

It is true that some level of positive economic figures is a necessary condition of a country's well-being because otherwise, it would lack resources to satisfy some of people's basic needs (those which require some level of material assets). But it is of the utmost importance to highlight that material "plenty" is a necessary but in no case sufficient condition for well- being. It is fair to say that a country that lacks the necessary resources to feed its population should be regarded on that matter as less developed than one who possesses such resources (and makes them available to the population). Nevertheless, because of economic factors' limited scope, as in the case of Chile during the military dictatorship, it is perfectly possible for the economic indicators of a country to overrate the country's development level because material well-being alone does not account for development.[27]

The opposition to the "conflation of economic growth (as measured by the change in GDP) with development" has been most manifestly articulated within economic literature through the Human Development Report (HDR) of the United Nations and, particularly in its

[26] In words of the acclaimed Chilean poet Nicanor Parra: "There are two breads. You eat two. I eat none. Average consumption: one per person." (*Free translation from:* "*Hay dos panes. Usted se come dos. Yo ninguno. Consumo promedio: un pan por persona*") Parra's potent satire ludically illustrates how insufficient product per capita measures (as a reflection of a country's available resources) are to really learn how much resources the people of a certain country have access to. This is highly relevant in the case of Chile which, according to the most recent available data was found to be the second most unequal country in the OECD with a Gini (at disposable income after taxes and transfers) of 0,454 in 2015, only surpassed by Mexico's 0,458 in 2016. "Inequality - Income Inequality - OECD Data," OECD, 2019, http://data.oecd.org/inequality/income-inequality.htm. [Accessed April 24, 2019].

[27] Patricio Meller, *Pobreza y Distribución Del Ingreso En Chile (Década Del 90)* (Centro de Economía Aplicada, Departamento de Ingeniería Industrial, 2000).

Human Development Index (HDI).[28] In the foreword of its first edition, the HDR explicitly rejects the vision that places growth—and its alleged consequence over people's income—as an equivalent of development. The report states that: "[t]he purpose of development is to offer people more options. One of their options is access to income, not as an end in itself but as a means to acquiring human well- being."[29] The HDR was designed by the Pakistani economist Mahbub Ul Haq, who managed to harness in the report distinct concerns about the narrowness of GNP-oriented analyses.[30] Ul Haq designed the new report for the United Nations Development Project (UNDP) "drawing heavily on the capabilities approach to human welfare."[31] Inspired by this approach he proposed the use of a unitary index of development (the HDI) that combined multiple factors.[32]

The original formulation of the capabilities approach as a standard of social justice has been credited to Martha Nussbaum and Amartya Sen.[33] The theory emphasizes people's

[28] Elizabeth Stanton, "The Human Development Index: A History," *PERI Working Papers*, January 1, 2007, https://doi.org/10.7275/1282621; Sakiko Fukuda-Parr, "Rescuing the Human Development Concept From the HDI: Reflections on a New Agenda," in *Readings in Human Development: Concepts, Measures and Policies for a Development Paradigm*, by UNDP, ed. A. K. Shiva Kumar and Amartya Kumar Sen (Oxford University Press, 2005), https://digitallibrary.un.org/record/551696.
[29] *Human Development Report 1990*, United Nations Development Programme (New York: Oxford University Press, 1990), iii.
[30] Malhub ul Haq, *Reflections on Human Development* (Delhi: Oxford University Press, 1995); Amartya Sen, "A Decade of Human Development," *Journal of Human Development* 1, no. 1 (February 1, 2000): 17–23, https://doi.org/10.1080/14649880050008746.
[31] Stanton, 14, "The Human Development Index."
[32] Sen, 17-19, "A Decade of Human Development."
[33] Prasanta K Pattanaik, "Some Nonwelfaristic Issues in Welfare Economics," *Frontier Issues in Economic Thought* 3 (1997): 110–12. Nussbaum's and Sen's version of the Capabilities Approach is regarded as the original version of the approach but it is not the only one. For other versions, for example, see Alexander. Kaufman, *Capabilities Equality: Basic Issues and Problems* (New York: Routledge, 2006); Jonathan. Wolff and Avner. De-Shalit, *Disadvantage* (Oxford: Oxford University Press, 2007), http://pi.lib.uchicago.edu/1001/cat/bib/6422207; J.M. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum.* (New York: Routledge, 2016); Christopher A. Riddle, *Disability and Justice: The Capabilities Approach in Practice* (Lanham: Lexington Books, 2014).

capabilities.[34] That is, what people are able to do or be.[35] It is grounded on a vision "of the human being as a dignified free being who shapes his or her own life, rather than being passively shaped or pushed around by the world in the manner of a flock or herd animal."[36] Capabilities in Nussbaum's and Sen's formulation can be viewed as "occasions for choice, areas of freedom."[37] A salient difference between their versions of the approach is that Sen does not enunciate a concrete list of fundamental capabilities, whereas Nussbaum proposes a list of ten central capabilities.[38]

The crucial aspect of the approach, for Sen, is that it shifts attention from the value of the means to attain capabilities and functionings to their actual achievement.[39] On his version, basic capabilities convey "the ability to satisfy certain elementary and crucially important functionings up to certain levels" (45). In his account, "[c]apability, as a kind of freedom, refers to the extent to which the person is *able to choose* particular combinations of functionings" and that the

[34] Besides rejecting the narrowness of wealth-focused accounts, a crucial aspect of the capabilities approach is that it enhances human freedom as the focus (as opposed to human *functionings*). That is, because we value human freedom we do not focus our analysis on what people do (hence implicitly imposing some determinate course of action) but on what people are able to do, that is, what opportunities have they been afforded Martha Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice," *Feminist Economics* 9, no. 2–3 (January 1, 2003): 33–59, https://doi.org/10.1080/1354570022000077926; Martha Craven Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011); Sen, "A Decade of Human Development.", 74.

[35] Nonetheless, "the evaluative focus of [the approach], can be either on the realised functionings (what a person is actually able to do) or on the capability set of alternatives she has (her real opportunities). The two give different types of information-the former about the things a person does and the latter about the things a person is substantively free to do. Both versions of the capability approach have been used in the literature, and sometimes they have been combined" Sen, "A Decade of Human Development"; Martha Nussbaum, "Capabilities and Social Justice," *International Studies Review* 4, no. 2 (June 1, 2002): 123–35, https://doi.org/10.1111/1521-9488.00258.

[36] Nussbaum, "Capabilities and Social Justice."

[37] "Capabilities, Entitlements, Rights: Supplementation and Critique," in *Justice and the Capabilities Approach*, by Martha Nussbaum (Routledge, 2017); Sen, "A Decade of Human Development."

[38] Amartya Sen, "Capabilities, Lists, and Public Reason: Continuing the Conversation," *Feminist Economics* 10, no. 3 (November 1, 2004): 77–80, https://doi.org/10.1080/1354570042000315163; Nussbaum, "Capabilities as Fundamental Entitlements."

[39] Amartya Kumar Sen, *Inequality Reexamined* (Oxford University Press, 1992), 46.

"freedom to have any particular thing can be distinguished from actually having that thing.[40] What a person is free to have, not just what he or she actually has, is relevant" (335). Although Sen does not offer a list of central capabilities, his writings reflect he considers some issues more pressing than others. His own prioritization may be somewhat deduced from the examples he uses on his work.[41] Education, healthcare and the eradication of gender discrimination and political oppression seem to constitute for him particularly relevant capabilities.[42] His characterization of development, for example, implicitly identifies their centrality. "Development" he says "requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states."[43]

On Nussbaum's formulation, there are ten central capabilities each society should put forward through "local specification."[44] These are life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play and control over one's environment.[45] In her account, capabilities are interdependent and singling one out to index social positions is a mistake, "all are minimum requirements of a life with dignity,

[40] Sen, 334, "Capabilities, Lists, and Public Reason."
[41] Though it is important to keep in mind that he believes that not "everything that can be put into the format of that space [of evaluation] must, for that reason, be important—not to mention, equally significant" (Sen 1999a, 46).
[42] Sen, *Inequality Reexamined*; Amartya Sen, "Commodities and Capabilities," *OUP Catalogue*, 1999, https://ideas.repec.org//b/oxp/obooks/9780195650389.html; Amartya Sen, *Development as Freedom* (Knopf Doubleday Publishing Group, 2011); Amartya Kumar Sen, "Development as Capability Expansion," in *The Community Development Reader*, by James DeFilippis and Susan Saegert (Routledge, 2012), 319–27; Sen, "A Decade of Human Development."
[43] Sen, 4, "A Decade of Human Development."
[44] Nussbaum, 304, "Introduction."
[45] Nussbaum, "Capabilities as Fundamental Entitlements."

and all are distinct in quality."[46] For her, "capabilities are seen not as isolated atoms but as a set of opportunities that interact and inform one another."[47] Thus, "all the capabilities on the list are important and […] subordinating one to another will not be a recipe for achieving full justice."[48] She holds that "[t]he approach does not invite, and positively forbids, trade-offs and balancing when we are dealing with the threshold level of each of these requirements."[49] Therefore, although her list comprises political liberties in several capabilities, her theory is incompatible with this paper's claim which is precisely the qualitatively distinct importance of political capabilities and the correlative need to incorporate them to the Human Development Index.[50]

Both Nussbaum and Sen identify to some extent the capability to participate in political affairs. Yet, the argument I will present is only compatible with Sen's version of the approach because it assumes some level of prioritizing political liberties is necessary.

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[46] Martha Craven Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, The Tanner Lectures on Human Values (Cambridge, Mass.: Harvard University Press, 2006), 84-85.
[47] Sen, "Capabilities, Lists, and Public Reason"; Nussbaum, 98, *Creating Capabilities*.
[48] Nussbaum, 97, *Creating Capabilities*.
[49] Nussbaum, 85, *Frontiers of Justice*.
[50] Its significance can be recognized in Sen, "Commodities and Capabilities"; Sen, *Development as Freedom*; Sen, "A Decade of Human Development"; Amartya Sen, "Human Rights and Capabilities," *Journal of Human Development* 6, no. 2 (2005): 151–66; Sen, "Development as Capability Expansion."several of the Nussbaum's central capabilities; in "Senses, imagination and thought" in relation to freedom of expression, in "affiliation" regarding the freedom of assembly and speech and in "Control over one's environment" which in relation to the political environment entails "Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association". In the case of the Chilean dictatorship's violent opposition to political dissent or criticism, other capabilities of the list were also deeply trumped such as the capacity to experience "emotions" which includes being able to mourn our losses, question that became extremely hard in the case of the detenidos desaparecidos. The brutality of the CNI's and DINA's tortures entailed an irremediable detriment to "bodily integrity" because of the severe physical harm inflicted on the victims and to "life" on the cases in which it left a life "so reduced as to be not worth living" Nussbaum, "Capabilities as Fundamental Entitlements," 41–42. Sen explicitly argues in favor of political freedom as a relevant consideration for development in chapter 6 of Development and freedom. He argues against those who allege that "focusing on democracy and political liberty is a luxury that a poor country "cannot afford"" and that "basic political and liberal rights" are important for development Sen, 146-148, "A Decade of Human Development."

Before I proceed to expose the relevance of political freedoms as a capability, I want to be clear in that I do not intend to reduce development to political freedom alone. My analysis presupposes the existence of other central capabilities currently present on the development measures, the complementarity of these capabilities is in fact a necessary premise of the present reasoning.[51] Similarly, not everything that is meaningful for a human life can be reduced to a measurement so from the fact that something is not present on the index it should not be assumed that it is not important. Nonetheless, given our finite resources and the approach's aspiration to actually serve to make people's life better, I am inclined to prioritize certain capabilities, and advocate for their incorporation, whiles recognizing that the ideal is to foster them all.[52]

Political freedom can be regarded as an essential capability for development for at least three sets of reasons. These have been characterized by Sen as reasons related to its direct importance, its instrumental value and its constructive role.[53] First, the direct importance of political freedom relies on its truly human character, one which bread alone cannot provide. The possibility to appear in the public forum and have a voice in it is by itself a valuable capability for human existence.[54] The ability to express one's thoughts and desires to one's community is a meaningful form of freedom. Second, the instrumental value, of political participation as a capability rests on its ability to orient governmental action: "rulers have the incentive to listen to what people want if they have to face their criticism and seek their

[51] Nussbaum, 301-308, "Introduction."
[52] Wolff and De-Shalit, *Disadvantage*; Riddle, *Disability and Justice*.
[53] Sen's argument was specifically about democracy but I use the more general term of political liberties in order to assess a larger number of issues related to collective action and participation. Sen, 148, "A Decade of Human Development."
[54] Sen.

support in elections" (152). This criticism benefits public decisions. An illustrative example of this is that no major famine has ever taken place on a "country that is independent, that goes to elections regularly, that has opposition parties to voice criticisms and that permits newspapers to report freely" (152).[55] Finally, the constructive role of political liberty consists on the power it entails for "the conceptualization—including comprehension—of 'economic needs." (153) The question of what issues constitute "needs" is not static because it depends on our conceptions of what is it that we benefit from, as well as an opinion on which deprivations are preventable. Deprivations that are not avoidable (mortality for instance) are not seen as needs (154). Both the determination of what we benefit from and the characterization of a deprivation as avoidable need reflection to advance, which is enhanced by public debate. Because needs are dynamic it is particularly important to incorporate public debate to their determination (for example, access to nature may not have been regarded as a need a century ago whereas it might be now).

But of course, accepting political freedom as a relevant capability does not *per se* imply that it should be measured or otherwise incorporated into the HDI. There is, naturally, a distance between asserting something is a very important capability and incorporating it to the HDI or even the HDR. The case for the incorporation of democracy on the HDI relies partly on its symbolic power. Remember that the HDI is a measure that intends to, unlike growth, offer a compound

[55] Sen's example considered the experience up to the year 2000, but according to the statistics of Our World in Data (2019), it remains true up to 2016 [Accessed May 4, 2019. https://ourworldindata.org/uploads/2018/03/Famines-by-pol-regime.png]. Since then, according to the Food and Agriculture Organization of the United Nations (2019), several regions of Nigeria, Somalia, and Yemen have entered a state of emergency which nonetheless has not yet constituted a state of famine. In the context of Civil War famine has been declared on some zones of South Sudan. [Accessed May 4, 2019. http://www.fao.org/emergencies/crisis/fightingfamine/en/].

account of development. Specifically, it "is a composite index focusing on three basic dimensions of human development: the ability to lead a long and healthy life, measured by life expectancy at birth; the ability to acquire knowledge, measured by mean years of schooling and expected years of schooling; and the ability to achieve a decent standard of living, measured by gross national income per capita."[56] But the HDR does not only contain the HDI, it also includes four other indexes. The first "discounts the HDI according to the extent of inequality," the second "compares female and male HDI values," the third "highlights women's empowerment," and the fourth "measures non- income dimensions of poverty."[57] The distinctive feature of the HDR is that it reflects an understanding of development more rich and complex than its main contenders "the GNP or other income-based metrics."[58] As aforementioned, the HDI's compound structure is the incarnation of the theoretical basis it rests on: development is more than growth. "The purpose of development is to offer people more options" and the availability of options does not depend on people's income alone.[59] Although the social justice theory of the capabilities approach may not be completely apprehended or diminished to a certain metric, the selection of the com- ponents of the HDI does implicitly emphasize the relevance of certain capabilities.[60]

The incorporation of political freedom would evaluate an area that is not sufficiently considered in the current HDI. Because capabilities are related one could argue that the issues that are currently considered on the HDI offer a sufficient proxy for political liberty. But the

[56] *Human Development Report 1990*, 1.
[57] *Human Development Report 2018*, United Nations Development Programme (New York: Oxford University Press, 2018).
[58] Sen, 21,"A Decade of Human Development."
[59] *Human Development Report 1990*, iii.
[60] Nussbaum, 135, "Capabilities and Social Justice."

current formulation fails to incorporate criteria that consider political participation. It is perfectly possible for a country to have decent educational, health and economic indicators and still have no popular participation in government. Further, it is perfectly compatible with the HDI and HDR for a country to have great indicators while political dissidence is prosecuted with the state's apparatus and subject to torture.[61]

Questioning the index's components (or their absence) is not an objection to the index itself, quite to the contrary: such internal criticism reflects a serious commitment with the project. As the 2010 Human Development Report so eloquently stresses:

> The objective is not to build an unassailable indicator of well-being —it is to redirect attention towards human-centered development and to promote debate over how we advance the progress of societies. The more we discuss what should or should not be included in the HDI —whether it makes sense to lump distinct categories together, how much importance to accord to each category, how to obtain more and better data— the more the debate moves away from the single-minded focus on growth that pervaded thinking about development (UNDP 2010, 13).

The HDR's commitment to dynamism and open discussion is not an empty declaration of good intentions. It has been reflected on the actual formulation of the reports, which have evolved in several aspects in response to criticism (Klugman, Rodríguez, and Choi 2011). Acknowledging that the absence of a variable from the report does not imply that it is not necessary for development, it is worth stressing that, the opposite, that is, incorporating a

[61] Surely under this form of negative induction, one could argue for a myriad of things that ought to be incorporated into the measurement, for example, the access citizens may have to art. But, naturally, not all of them can be incorporated into the measurement without it deveining in an unintelligible and therefore irrelevant collage of countless aspects. The simplicity of the HDI is part of its charm as it allows for a somewhat complex consideration of aspects by focusing on modest and comprehensible criteria. Therefore, prioritization is an important part of determining which measurements ought to be incorporated to the index.

variable to the index, positively signals that such variable is particularly relevant for development.

An illuminating parallel to this feature can be found on the relation between learning and evaluation in higher education. Evaluation methods do not intend to cover everything a student learns in a course, nor do they pretend that the student's learning process be reduced to what is evaluated. Still, the way in which the skills and contents delivered by a course are evaluated have an impact on the way students confront their learning process. Evaluation methods more focused on critical thinking enhance reflective skills more than content assimilation-oriented alternatives. Naturally, the learning process is far richer and more complex than its evaluation, but the evaluation has at least two distinctive features that make it attractive.[62] First, it signals a specific takeaway considered particularly

relevant, thus expressing the object of the course. To some extent therefore, the signaling process constitutes the object it is trying to apprehend, in a form analogous to that of institutional facts. A metric has the logical form of what Searle has referred to as institutional facts, that is X counts as Y in C. What is interesting about this feature is that the measure both constitutes and represents the question it pretends to signify. The truly salient feature of a metric is that it declaredly assumes that form: "X indicator counts as Y performance in C context."[63] The beauty of such a structure is that in the case of measures although the object (in this case development) is not

[62] As in the case of development measures, evaluation methods on higher education carry the risk of leaving out relevant components of the education process. Thus, the signaling of one (or some) particular feature (or features) over the others implies to an extent that other measures are not signaled to be as relevant as the ones that are actually being evaluated.

[63] John R. Searle, *The Construction of Social Reality* (Simon and Schuster, 2010).

reduced to the measure, it nevertheless (to some extent) constitutes it. What we measure to count as development is to some extent what we believe development is. Second, it provides a metric that allows the comparison between performances. Both these features provide a common language that can express and make comparable otherwise incommensurable accomplishments. In the case of development, incorporating political liberties as a factor into the HDI, or, at least, incorporating it as a measure to the HDR would be a way of signaling the importance of that aspect for development and allowing the comparison between different countries on such respect. I advocate for the inclusion of political freedoms on the HDI because of their symbolic importance. The HDI is the measure that concentrates the items regarded as most basic to human capabilities and hence development. It is the unified index that made the dispute against income-based development models prosperous. Though the HDR is also committed to the task of providing a more comprehensive picture of human development by concentrating on aspects that are not incorporated into the HDI, because of its dispersed nature its symbolic value is a bit fainter than that of the HDI. The relation of both can be depicted as the one between the overall score a restaurant receives from a food critic in relation to the score it obtains from her on other components individually considered.[64] I believe democracy should be included to the "overall" measure—HDI—but were it to be included as an independent measure—in the HDR—its importance would still be stressed and incorporated as a factor of development.

[64] I have in mind the evaluations that grade different items separately (food, ambiance, price, service) but give an overall score to the restaurant which is not an average of the other variants but an independent (although certainly influenced by those factors) score. The symbolic power of the HDI would be that of the overall score whiles that of the HDR would correspond to the value ascribed to the assessment of the items separately.

Of course, one of the main objections against this proposal is that measuring political freedom is hard and highly polemical because the design of the indicator inevitably requires the assumption of certain political positions. This is partly why the Human Freedom Index which was incorporated into the HDR in 1991, modified in 1992 and 1993 was then discontinued.[65] Discerning on this issue, the HDR of the year 2000 stressed that an index of freedom ought to "empower readers to understand the judgments" instead of obscuring them, an aim that was not achieved by the 1991, 1992 and 1993 measurements.[66] In relation to the methodological difficulties, alternative methodologies to measure political freedom have been developed since the 1991, 1992 and 1993 reports elsewhere, but they still appear to be too complex to be comprehensible by the general public.[67] Perhaps a sensible alternative would be the incorporation of a simpler measure, one that reflected the existence of a few central political capabilities, for example, freedom of speech, the regular existence of elections and absence of physical repression by the state. This could be measured by assigning scores from 0 to 2 in order to diminish as much as possible the influence of the measurer's discretion. Of course, the actual development of an index should be much more thoroughly considered, discussed and tailored. The purpose of this example is only to suggest that what the design of the index would need is to renounce the richness that can be achieved by the consideration of multiple factors and extended scales for the sake of the index's readability and, thus,

[65] Fukuda-Parr, 119, "Rescuing the Human Development Concept From the HDI: Reflections on a New Agenda."
[66] *Human Development Report 2010*, 91, United Nations Development Programme (New York: Oxford University Press, 2010).
[67] See for example the revision of the indexes of the Freedom House (2019) Report methodology in 2016 and 2017. Accessed May 1, 2019.

legitimacy. That is, the design of a simple index that considers few factors and uses a squat scale, though limited as a tool to apprehend the nuances of political liberties, may be a feasible alternative in order to provide a common language and sphere of comparison. Moreover, the referred criticism assumes a strict qualitative differentiation between the measuring of democracy and, for example, education. It regards the first as eminently political and the second as strictly technical and neutral, but this contrast ought to be tempered. Currently, the educational component on the HDI considers the expected years of schooling as those a child expects to receive if enrolment rates are kept constant in relation to the mean years of schooling. In my view, it is not mistaken to think that it could have been construed instead through the analysis of literacy rates as had been done in the past (hence incorporating home-schooling to the measure). Instead, the literacy rate is currently considered on the HDR but it was not the measure used in the HDI.[68] Though there are good reasons to opt for the current measure, the selection requires the use of some discretion which is not necessarily neutral. This, of course, is not to say that the HDI should return to the literacy rate measure: my goal is simply to stress that the selection of any given criteria involves trade-offs which need the weight of certain qualities to be settled.

A separate line of objections has been that democratic values are distinctively "Western values" and that the incorporation would be a form of imperialistic imposition in more authoritarian "Asian cultures". Sen persuasively discards this criticisms by showing how "Asian cultures" as well as "Western cultures" encompass a rich tradition in which both

[68] *Human Development Report 2018,* 54-57.

authoritarian as well as democratic values coexist and there is no reason to believe that "Asian cultures" are monopolized by authoritarianism nor that "Western cultures" are the paragon of democratic values.[69] Given that there is apparently no good reason to sustain the claim that "Asian cultures" especially value so-called authoritarian ideals, nor is there in principle reason to exclude political liberties from the evaluation of such nations. If something, it seems to be a reason to seek for such data even more vehemently. Bearing in mind all the difficulties that encompass this task. Why should we go through so much trouble to incorporate a constricted measure to the index, particularly considering that there are other entities that provide freedom measurements and are probably not subject to the same legitimacy requirements the HDI is? While there certainly is a pragmatic point to the objection, I believe the incorporation of a political freedom measurement is nonetheless worth the trouble. Political capabilities are a crucial part of development for the reasons I have mentioned: their direct, instrumental and constructive value. Still, there is another reason for which incorporating political freedom as an indicator is crucial: it is the only dimension that recognizes the richness of collective interaction as a necessary feature of human capabilities.

4. The Case for Political Freedoms Our Form of Collective Imagination

Concordant to the issues that have already been referred to in this work, political freedom is a central capability absent which development is inevitably flawed. An additional argument in favor of the inclusion of a political freedom measurement to the HDI or the HDR is that

[69] Sen, "A Decade of Human Development."

it would be the only truly collective indicator in them.[70] My claim is that such an indicator would reflect a public dimension which is currently not systematically considered on the HDI or the HDR. That is, not a sphere which is contingently collective, as could be education (which could theoretically be received in solitary) but that is precisely based on the significance of its public character. Political action by definition may not be exercised in solitary since it requires the interaction of different discourses on the public forum or, at the very least, the presence of several voters (if not candidates and projects) at the urns. This entails a distinctively public domain that is of the utmost importance for human existence.

To Hannah Arendt the term public enclosed two distinct but interrelated meanings. First, "everything that appears in public can be seen and heard by everybody and has the widest possible publicity" that is, the public is to an extent what is apprehended by the senses in a non-private scenery. The second corresponded to "the world itself, in so far as it is common to all of us and distinguished from our privately owned place in it" (Arendt 1998, 52). This public world is not identical to nature as in a place for biological life but "[i]t is related rather to the human artifact, the fabrication of human hands" (52) For Arendt, in this second sense, "[t]he public realm, as the common world, gathers us together and yet pre- vents our falling over each other" (53). Both of these senses are integral to political liberties as forms of public freedoms. Their

[70] It could be argued that the environmental index of the 2018 report is a collective indicator. Nevertheless, it is not collective in the sense that it belongs to the public sphere as I shall argue of the political liberties on the following pages. At most, the environment is collective in the sense that it is a common resource. That is, a resource that is available to all and affects all. It is not a space in which people necessarily relate to each other. The eventual collective character of the environment is relatively contingent, if something, its capacity to group people together has been given by the political organization against the environmental destruction threat by indiscriminate economic exploitation.

importance and qualitative difference with purely individual aspects rises from the fact that "[t]he subjectivity of privacy […] can never replace the reality rising out of the sum total of aspects presented by one object to a multitude spectators" (57) The public forum is the setting where all the perspectives are exposed and where the spectators "see sameness in utter diversity" (57), a space from which a common world may rise. This is the political forum institutionally portrayed by the avail- ability of political freedoms.

In Carl Schmitt's agonal description, the political is a distinctive realm of human existence that operates under its own criteria given by the friend-and-enemy grouping (Schmitt 2008). The relevant characteristic of such grouping for Schmitt is that "to the enemy concept belongs the ever-present possibility of combat" (32), and the friend-and-enemy groupings "receive their real meaning precisely because they refer to the real possibility of physical killing" (32). But Schmitt spends far too much time on the depiction and construction of the concept of enemy and way too little on its counterpart concept of friend which is reduced to a mere residual category as those who are not considered enemies in a concrete opposition. But there is much more to it. The concept of friend and the political carries with it the possibility of human encounter. In Arendt's image, the political insofar as it is public engenders a uniquely shared reality that is the artefact of human hands and ideas. It is the common space we inhabit as human beings and in which we recognize each other as such. The possibility of displaying collective capabilities through the creation of truly collective political ventures ought to have a heightened recognition on our ideas and measurements of development.[71]

This is precisely the core argument in favor of incorporating a measure of political

[71] Hannah Arendt, *On Revolution.* (New York: Viking Press, 1963).

> freedom. Such incorporation would express, symbolically, the indispensable character of collective capabilities for development. It would signal, by highlighting it through the HDI, that a human life without a space to act collectively lacks a qualitatively distinct and essential form of freedom, which cannot be replaced by any kind of welfare and absent which development is inevitably trumped. It provides the space for collective action which is so uniquely human (Arendt 1961).[72]

One could assume initially that there is a certain tension between this argument and the capabilities approach. Insomuch as the capability's approach raises the individual to the center of the debate, it could be argued that measuring a collective capability contradicts it. Nonetheless, if closely considered, this approach is in no way incompatible with the addition of a properly public sphere if we take into consideration that the person who ultimately benefits from the existence of that collective space is still singular. Metaphorically speaking: the beauty of a garden is qualitatively distinct from the mere addition of the beau- ties of each one of the plants that conform it. Still, that does not mean that the plants cannot be the central object of preoccupation of the gardener, who shall still water and take care of each one. Instead, it simply means that the interaction of a plant with others in a garden may be a valuable aspect. That is, we can (and should still) consider human beings as the end of development and at the same time acknowledge the value the political sphere provides to each human being. Particularly considering its truly human character since only humans are capable of the virtue of political freedom.

[72] The space that can be exercised in our shared reality, in the eloquent words of Arendt: "[W]herever the man-made world does not become the scene for action and speech—as in despotically rules communities which banish their subjects into the narrowness of the home and thus prevent the rise of a public realm—freedom has no worldly reality. Without a politically guaranteed public realm, freedom lacks the worldly space to make its appearance" Hannah Arendt, 148–149, *Between Past and Future: Six Exercises in Political Thought.* (New York: Viking Press, 1961).

5. Conclusion

The avid protests that have been taking place in Chile since the 18 of October of 2019 (and continue to this date, January 2020), despite the country's overall positive economic indicators, provide an ever more pressing reason to think about development as something more than wealth-related metrics.

Regrettably, the idea that the Chilean dictatorship amounts to a distant dark chapter of the past is hard to defend today in the global context. The Brazilian Federal deputy who said "Pinochet should have killed more people" is now president. Jair Bolsonaro has not only publicly supported Pinochet and the Brazilian dictatorship but has positively stated that torture is a legitimate practice.[73] Not far from that sidewalk, president Donald Trump held during his campaign in 2016 that torture works, but, even if it didn't "they [terrorists] deserve it anyway, for what they're doing."[74] Sadly, the question from which this paper arouses is still vivid. The general squabble between economic growth champions and defenders of democracy is yet to be settled. Not even in the case of countries that currently have democratic regimes are political freedoms out of question. Outside the discussion over the metrics, the value of political freedoms is being probed. The so-called crisis of representative democracy does not seem to come to an end and, contrarily, throughout the world, leaderships that explicitly disregard minimal democratic values have augmented.

[73] Veja, 2 December 1998. The context of his comment was a Congress plenary were the non-recognition of Pinochet's immunity was announced.

[74] 'Trump says 'torture works,' backs waterboarding and 'much worse,' Washington Post, Accessed May 5, 2019. Available at: https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.e9286c260cef.

The HDI, as well as the HDR, are highly reputed measures that intend to express a nation's achievements in human development on comparable terms. The once bold ground they rested on, the perspective of human capabilities as the center of development instead of economic growth, has been furthered by the evolution and overall positive reception the measures have enjoyed. The HDR's advancement over time, as well as the HDI's modifications, has successfully incorporated and enriched the picture the initial 1990 report presented. However, they still fail to feature a properly collective human capability. Although there have been experimentations around the incorporation of a democracy index that accounted for at least some basic political liberties, these attempts have not turned out to be successful. The reasons are varied but not insurmountable and there are substantial ones to attempt to overcome the difficulties the project entails.

The observance of the Chilean dictatorship case offers a vivid projection of how political curtailments may translate into genuinely human deprivations. The usefulness of the case does not reside on its inductive potential since it indubitably represents a statistically negligible sample. Rather, the power of the Chilean case relies on its ability to illustrate the qualitative component of human dignity that inhabits political liberties as well as the importance of certain minimum guarantees any serious account of development should incorporate. There is a long road ahead to develop a sufficiently satisfactory metric for political liberties but the conviction of its preeminence should serve as an inspiration to confront the quest. Political freedoms are fundamental human capabilities. The omission of a properly collective human space on our measure of development shall not remain unaltered and ought to be addressed "*mucho más*

temprano que tarde."[75] The role of any given evaluation mechanism is in no way trivial. The most pristine account of their importance can be seen in the revolution the introduction of the HDI meant. Along with the transformation of the measurement, the very concept of development was transformed. Naturally, the idea that development implied more than growth was not discovered by the measure, as much as the importance of democratic values has been already greatly examined elsewhere, but what the incorporation of a political liberty measure to the index would involve is the declared centrality of it for our forms of comparison and mutual recognition. The incorporation would be both present and aspirational,[76] acknowledging the importance of collective action, to further imagine development in a human way.

[75] On a literal translation "much earlier than late" and, on a more contextual translation "sooner rather than later". The phrase alludes to Salvador Allende's final speech on 11 September 1973 from la Moneda as the presidential house was being bombed by the militaries. The President commended the Chilean people not to sacrifice themselves by fighting the armed forces. On the final words of his speech, he prompted the Chilean people to have faith and said "Keep knowing that, rather sooner than later, the great avenues will open again where man may pass freely in the pursuit of a better society" (Free translation of the Spanish version of Salvador Allendes last speech, delivered on 11 September 1973). [Accessed May 2, 2019. http://www.memoriachilena.gob.cl/602/w3-article-82594.html].
[76] Nussbaum, "Introduction," 301–308.

II. FROM THE RULE OF LAW TO A RULE OF RIGHTS

There has been a global tendency towards the growth of judicial control over the last decades. Have we transited from a rule of law to a rule of rights? The paper offers a brief description of the scope of the institutional transformations around the world and its underlying narrative. It describes the liberal ideals that inspired the concept of a rule of law and argues that these have been profoundly perverted by the institutional transformation legal systems have experienced. I suggest that the transit to a rule of rights jeopardizes some of our core democratic values, privatizing our politic disputes and eroding our common world.

'estos hilos aprisionan a las sombras
y las obligan a rendir cuentas del silencio…'[1]
Alejandra Pizarnik, Árbol de Diana (1962).

1. Introduction

Modern constitutional rights are the threads that force judges to account for the silence of our missing political deliberation. Tons of ink have been spilled on the debate about the role of judicial control over the actions of the executive and legislative powers in modern democracies. The institutional tensions that hunt neo-constitutionalism, as it has been called in legal scholarship, or the judicialization of politics, as it has been called in political science, are a regular source of debate. Still, the dispute is far from resolved.[2] The object of this article is to

[1] Trans.: 'these threads capture the shadows/ and force them to account for the silence' Alejandra Pizarnik, Diana's Tree, trans. Yvette Siegert with an introduction by Octavio Paz (New York: Ugly Duckling Press, 2014).
[2] The persistent relevance of the topic can be readily seen in the works published the present year: Erin F. Delaney and Rosalind Dixon, eds., Comparative Judicial Review, (Cheltenham: Edward Edgar Publishing Limited, 2018); Rebecca Hamlin and Gemma Sala, 'The Judicialization of Politics Disentangled', Oxford Research Encyclopedia of

address the discussion from a philosophical perspective, considering the ideals that inspired the 'rule of law' in order to provide an additional argument against judicial governance. I shall argue that judicial supremacy has perverted the meaning of the 'rule of law'. This transformation has meant a departure from the enlightened political ideal that once inspired it and the assumption of a new rationale I will refer to as the 'rule of rights.' This article uses Arendt's characterization of the 'public' to argue that the rule of rights impairs the nature of our political life by asserting a privatized comprehension of our common world.

The following argument rests on two premises that will be summarily reviewed for illustrative purposes but have been satisfactorily treated elsewhere. First, it assumes there was a tendency since the second half of the twentieth century across several nations to incorporate (at least some form of) judicial review.[3] Second, this paper assumes judicial control over the executive power's actions has – generally – intensified during the last several decades.[4] Though

Politics (May, 2018); Doreen Lustig and J. H. H. Weiler, 'Judicial Review in the Contemporary World—Retrospective and Prospective', International Journal of Constitutional Law (2018), 16, 2, 315–72.

[3] See, Tom Ginsburg, 'The Global Spread of Constitutional Review', in: The Oxford Handbook of Law and Politics, Oxford: Oxford University Press (2008); Tom Ginsbur and Mila Ver- steeg, 'Why do countries adopt constitutional review?', Journal of Law, Economics and Organization (2015). In a similar sense, Dyevre calls constitutional review 'a defining feature of global constitutionalism', Dyevre, Arthur. 'Technocracy and distrust: Revisiting the rationale for constitutional review', in: International Journal of Constitutional Law 13, 1(1) (2015), 30.

[4] For a general description of this 'second wave' both constitutional and administrative judicial review, see, Doreen Lustig and J. H. H. Weiler, 'Judicial Review', 320–1, 325ff. For a comparative evolution, see, Peter Cane, Controlling Administrative Power. An Historical Comparison (Cambridge: Cambridge University Press, 2016). For a discussion about the entanglement between judicial review and the neoliberal global order, see H. W. Arthurs, 'The Administrative State Goes to Market (and Cries 'Wee, Wee, Wee' All the Way Home)', The University of Toronto Law Journal 55, no. 3, 842–835, who describes that the 'emergence of a global discourse around constitutionalism, human rights, and the rule of law […] rests on a new (or revived) constitutional paradigm in which courts are located on a plane above all other public institutions. Law, it seems, cannot rule without courts; constitutions cannot shape public values or institutions if courts cannot interpret and enforce them; rights will not survive if courts are not their primary guarantors […] As a result, in this era of hyper-constitutionalism, administrative agencies may become increasingly litigation averse, fearing confrontation with a re-energized judiciary, and there- fore less aggressive in pursuing their mandate to protect the public'. Also, Samuel Tschorne, 'Neoliberalism and the crisis of public law', Anna Yeatman, ed., Neoliberalism and the crisis of public institutions, Working Papers in the Human Rights and Public Life Program, Whitlam Institute, Western Sidney University (2015). For Germany, the expansion of administrative control is argued by Rainer Wahl, Herausforderung und Antworten: Das Öffentliche Recht der letzten fünf Jahrzehnte (Berlin: De Gruyter Recht, 2005). For a narrative which makes the opposite case for the United States, showing how judicial control over the administration has retreated in that country, see Adrian Vermeule, Law's Abnegation: From Law's Empire to the

there certainly are significant differences in the form legal systems have dealt with these phenomena – some have incorporated judicial review of constitutionality, others have extended the judicial control over the actions of their governmental agencies and some have encompassed both – an overall shared tendency towards 'judicialization' justifies a common overview. This shift towards judicialization is the counterpart of the rise of rights as the main focus of political and legal thought. In section II I will offer some definitions and methodological clarifications. Section III then depicts the ideas that historically inspired the notion of the rule of law. Section IV discusses the circumstances scholars have identified as the origin of the transformation and briefly describes its content (new conception of rights, growth of judicial review, augmented control of executive action and the transformation of litigation), exemplifying through some cases of different jurisdictions. Section V argues that the transformations public law has traversed are so structural that the concept of 'rule of law' has been rendered void. It proposes that the current status of public law would be better described by the concept 'rule of rights'. This section also echoes the current discussion on the democratic values that this transformation has confronted, siding with the counter-majoritarian criticism. Section VI proposes an additional argument against the rule of rights, based on Hannah Arendt's notion of the 'public', alleging the modern comprehension of public law as rights-based erodes the sphere of what ought to be public. Section VII then concludes that the privatization of law implies a more comprehensive privatization of our common existence.

2. Definitions and Methodological Considerations

Administrative State (Cambridge, Mass.: Harvard University Press, 2016).

Since the concepts employed in this article rise certain ambiguity, I will provide definitions for judicial review, public law and rule of law. I understand judicial review as the authority vested in the courts to revise the legality of the acts of the other branches of government. Judicial review involves mainly two distinct operations: control over legislative outcomes and control over the actions of the executive power.[5] Both of these operations give extensive power to judges over public policy outcomes, which is why the phenomena has sometimes been labelled 'judicialization of politics.'[6]

Secondly, public law is to be defined upon its task, articulated as 'the constitution, maintenance and regulation of governmental authority.'[7] The concept encompasses both constitutional and administrative law, and thus is not limited to constitutional statute, but includes acts of legislation, administrative decisions, municipal plans or projects, executive orders and judicial decisions.[8] It is worth noting for this purpose that public law is not a body of norms, but a practice with its own tradition, the distinctive character of which derives from the singularity of its object: 'the activity of governing.'[9] Third, by rule of law we denote the principle by which governments 'shall be ruled by the law and subject to it. The ideal of the rule of law in this sense

[5] I therefore use legality here in a broad sense, to include both the control of 'unconstitutional laws', i.e., legislative acts that conflict with constitutional provisions, and the control of 'illegal government acts', i.e., normative provisions enacted or material acts carried out by an administrative institution which conflict with constitutional provisions or legal statute. These definitions are standard in the literature. See, e.g., Ginsburg and Versteeg, 'Why do Countries', 589 n. 1: 'Constitutional review is technically a subcategory of judicial review, which also includes review of administrative action for conformity with a statute or the constitution, although the terms are often used interchangeably in the literature.'

[6] For a general overview of this practice, see, Martin Shapiro and Alec Stone Sweet, On law, politics and judicialization (Oxford: Oxford University Press, 2002). More recent scholarship has tended to focus on regional similarities and differences, e.g., Rachel Sieder, Line Schjolden, and Alan Angell, eds., The Judicialization of Politics in Latin America, (New York: Palgrave Macmillan, 2005); Björn Dressel, ed., The Judicialization of Politics in Asia (New York: Routledge, 2012); Reginald S. Sheehan, Rebecca D. Gill, Kirk A. Randazzo., Judicialization of politics : the interplay of institutional structure, legal doctrine, and politics on the High Court of Australia (Durham, N.C.: Carolina Academic Press, 2012).

[7] Martin Loughlin, The Idea of Public Law (Oxford: Oxford University Press, 2004), 1.

[8] For a contemporary analysis of such distinction, see, Vermeule, Law's Abnegation, 11.

[9] Loughlin, The Idea, 5.

is often expressed by the phrase 'government by law and not by men'.'[10] Hence, the fundamental matter the rule of law focuses on, enough for our purpose, is in governmental submission to a legal standard which is in part portrayed by the mythical 'rule of law and not of men'.

In order to assess the current state of the question this article considers the theoretical grounds over which the rule of law was edified and briefly exposes the major institutional variations public law has gone through. The transformations of public law and judicial review have been widely identified and described by scholars.[11] In consideration of the latter, the narration of the transformation described in the following passages is not intended to reflect a complete chronological account of the variations exhaustively depicted elsewhere, but merely an illustrative description of the circumstances that elucidate their nature.

3. The Enlightened Ideal of the Rule of Law

The concept of the rule of law rises only with the birth of the sovereign state.[12] The origin of the rule of law is generally attributed to the French concept of the *principe de légalité* and the

[10] Joseph Raz, The Authority of Law: Essays on Law and Morality, 2nd Ed. (Oxford: Oxford University Press, 2009), p. 212. It is this standard conceptual definition of the 'Rule of Law' which we will explore for our purposes, because it is this element which is common to all particular manifestations of the practice of the rule of law in different nations and
whose intelligibility is being threatened by the judicialization of politics. For a more nuanced understanding of the rule of law, which differentiates its practice in England, France and Germany, see, Martin Loughlin, Foundations of Public Law (New York: Oxford University Press, 2010), 315ff.

[11] For an analysis of this practice in the 1990s and its evolution in a comparative perspective, including references to the United States, United Kingdom, Australia, Canada, Italy, France, Germany, Sweden, The Netherlands, Malta, Israel, The Philippines, Namibia and former USSR countries, see, C. Neal Tate and Torbjörn Vallinder, Eds., The Global Expansion of Judicial Power (New York: New York University Press, 1995). For a more up-to-date analysis of the evolution of judicial review and judicial activism in Latin America, see, Gretchen Helmke and Julio Ríos-Figueroa, eds., Courts in Latin America (New York: Cambridge University Press, 2011). For a detailed legal analysis of this practice in Chile, see, Luis Cordero Vega, *Lecciones de derecho administrativo* (Santiago: Thomson Reuters, 2015).

[12] Loughlin, Foundations, 315.

German tradition of *Reechstaat*. Basically, the 'idea of the *principe de légalité* is that of *la loi expression de la volonté générale*.'[13] The concept of *volonté générale* (general will) is derived from Rousseau's conception of sovereignty which he defined as 'the exer- cise of the general will, [which] can never be alienated.'[14] The sovereign is 'a collective being, [which] can be represented only by itself.'[15] For Rousseau, the state was conceived for the common good and hence the social contract demands that it is the general will who institutes or defines such common good.[16] This idea rests on a fundamental distinction between the general will, that is driven by the common interest, and the particular will each citizen holds guided by his or her private interest.

It is important to note at this point that Rousseau's characterization of the general will explicitly establishes that it is something very different from 'the will of all' for it requires a particular object.[17] So, the concept of general will is founded upon the existence of some- thing other than the addition of citizens, the existence of a qualitatively different common will in which deliberation may enlighten the pursue of the public good.[18] Finally, for Rous- seau the limit of the sovereign is given by its means of expression. Given that 'the general will, to be truly such,

[13] Jacques Ziller, 'The Continental System of Administrative Legality', B. Guy Peters and Jon Pierre, eds., Handbook of Public Administration (London: SAGE, 2003), 168.
[14] Jean-Jacques Rousseau, The Social Contract and The First and Second Discourses, Edited with an Introduction by Susann Dunn (New Haven: Yale University Press), 170.
[15] Jean-Jacques Rousseau, The Social Contract and The First and Second Discourses, Edited with an Introduction by Susann Dunn (New Haven: Yale University Press), 170.
[16] Rousseau, The Social Contract, 170, 175: 'What, then, constitutes a real act of sovereignty? It is not an agreement between a superior and an inferior, but an agreement of the collective body with each of its members; a lawful agreement, because it has the social contract as its foundation; equitable, because it is common to all; useful, because it can have no other object than the general welfare'.
[17] Rousseau, 171.
[18] Rousseau, 172: 'There is often a great deal of difference between the will of all and the general will; the latter regards only the common interest, while the former has regard to private interests, and is merely a sum of particular wills; but take away from these same wills the pluses and minuses which cancel one another, and the general will remains asthe sum of the differences.'

should be so in its object as well as in its essence; that it ought to proceed from all in order to be applicable to all; and that it loses its natural rectitude when it tends to some individual and specific object.'[19] The common will is common insofar as it proceeds from all, is applicable to all and tends to the interest of all, this collective vocation is institutionally expressed through representative democracy.

On the other hand, the *Rechtsstaat* consisted on the idea by which sovereigns need 'to be bound by the rules they have made and which have to be stable, known by their sub- jects and applied in a fair manner to all of them by politically neutral judges and administrators.'[20] This conception was primarily based on a formal guarantee, centered on 'legal formalism as a safeguard for a fair social order.'[21]

Although the idea of the rule of law was erected upon a conception of the public body that recognized the sovereign's power is restricted by the law,[22] the boundaries articulated by both traditions had nothing to do with the modern conceptions of constitutional rights as substantive limitations on governmental or legislative action. It is worth noting that it was not until the formation of the modern states that public law was instituted as a systematic body of law along with the rule of law.[23] Since the sovereign was regarded at that time as an ideal through which society could pursue the common inter- est, the kind of restrictions conceived in the original formulation were decidedly centered in formal limitations. The very idea of a rule of law assumes the limits of governmental power are given by the laws and are thus general. In

[19] Rousseau, 174.
[20] Ziller, The Continental System, 167.
[21] Ziller, 168.
[22] Loughlin, Foundations, 337.
[23] See, Norberto Bobbio, The Age of Rights, trans. Allan Cameron (Cambridge: Polity Press, 1996).

this order of ideas, Montesquieu's famed assertion that the 'the judges of the nation are […] only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor' is illuminating in relation to the limited role ascribed to the judiciary, absolutely incapable of molding or construing substantive rights.[24] To be clear, it is not our contention that such ideal was ever enacted by nineteenth century institutions nor that it was ever incarnated in any historical moment. Rather, our reflection rests on the potential of narratives surrounding concrete institutional schemes as a partial realisation of their ideals. The idea is that these narratives perform as purposes of the collective imaginary.

4. The Fundamental Rights Revolution: from Citizens to Individuals

The enlightenment's liberal conception that inspired the idea of a rule of law was

[24] Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, The Spirit of the Laws, trans. Nne M. Cohler; Basya Carolyn Miller; Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 163. The origin of the idea of the rule of law is attributed to the French and German traditions and its development in Common Law jurisdictions differs in some aspects. In England, the contours of the concept were closely linked to the unwritten character of the Constitution. Prominent jurist Albert Ven Dicey placed the rule of law within the constitutional framework and expressed through that conception the English version of political liberalism. See: Loughlin, Martin. 'The Apotheosis of the Rule of Law.' The Political Quarterly 89, no. 4 (2018): 659–66. The situation of other Common Law jurisdictions, that unlike the English, had a written constitution, bear their own particularities. In light of these considerations, it is fair to pace and consider that the ideals described on this section paradigmatically represent the Civil Law tradition's model of the rule of law, since it was more directly inspired by them. In the case of Common Law jurisdictions in the 19th century, the preoccupation for individual rights as limits to governmental action was more pervasive than for Civil Law systems. Still, although that might explain some differences between both traditions it is still the case that they were both much closer together to each other (and their political ideals) on the 19th century than any of them is to their version today. The evolution that legal systems went through during the twentieth century transformed the practices of both Common Law and Civil Tradition systems. Perhaps the case to be made is that the transformation was more radical in Civil Law jurisdictions because it was further away from its traditional values. Still, even if Common Law systems were more inclined to considering private rights than Civil Traditions, the scope of the institutional manifestation of such theoretical grounding was drastically narrower than in the 20th century. For a summary on the differences of the political theories and different notions of liberty that underlie Common Law and Civil Law systems, see: Mahoney, Paul G. 'The common law and economic growth: Hayek might be right', The Journal of Legal Studies 30, no. 2 (2001): 508–13.; For a full version of the argument see: Hayek, Friedrich August. The constitution of liberty. Routledge, 2014. And Hayek, Friedrich August. Law, legislation and liberty, volume 1: Rules and order. Vol. 1. University of Chicago Press, 1978.

profoundly transformed as a result of the World War II trauma. Horrified by the brutality of the Nazi regime the enlightened ideals inspiring the constitutional system were reformulated and their center was, broadly speaking, shifted from law to rights.[25] This movement inside national jurisdictions – influenced by, though in no case identical with, the emerging international language of human rights as promoted by the Universal Declaration of 1948 –[26] intended to generate an effective constraint against the violation of basic individual rights in hands of the government or the legislator. Thus, the central focus of public law was stirred from a conception that had the public at its center to a new arrangement in which the individuals acquired a protagonist role. This ideal articulated the creation and transformation of several legal institutions onto what we have referred to as the rule of rights, guarded by the mighty bench. The reinvention of public law effected several consequences: (i) a new conception of rights.

[25] Wahl, Herausforderung und Antworten, 19ff.

[26] Though perhaps the most striking transformation that took place inside the international arena during the decades following the second world war was the recognition of human rights as justiciable entitlements citizens could enforce in supra-national courts, this transformation should not be confused with the related but different transformation of national public and constitutional law and institutions. Of course, the growing popularity of the language of constitutional rights and their articulation in terms of legal entitlement was both tied to the fortune of the human rights movement and might have also helped define some of its terms. But it is clear, that, whatever their relation after World War II, constitutional rights differ from human rights both in their pre-history and their political implications. Thus, an author such as Samuel Moyn can justly criticize the imperialist implication of human rights international discourse, while retaining hope for constitutional rights language in the national arena. See, Samuel Moyn, Human Rights and the Uses of History, expanded 2nd Ed. (London: Verso, 2017), 137ff, especially his claim that 'a politics based on the rule of law and the rights of individuals at home has rarely translated into the same politics above'. […] even liberal internationalists […] cannot imagine a world beyond domination'. (Moyn, Human Rights, 137–8), and his prediction that 'whoever seizes hegemony in an era of American decline will inevitably follow America's recent liberal internationalists in offering versions of history suggesting the moral propriety of their own inheritance of the globe. And they will have their own policy intellectuals struggling to prove that their dominance really is the best thing for a world that suspects otherwise' (Moyn, 149). Moreover, while Moyn has convincingly shown that human rights emergence is only a powerful reality from the 1970s onward (Moyn, 103ff, 173–173), the change in the language of constitutional rights, the transformation in Court cases and its relation with the institutional spread of judicial review are phenomena whose roots in the 1940s are very well documented. See, e.g., Louis Henkin, The Age of Rights (New York: Columbia University Press, 1990), 143ff. As he states, 'Americans are aware of their rights, as if in their blood. We live our rights in our lives daily. Human rights, by contrast, are only come-lately to our common consciousness […], American [national] rights and international human rights are intimately related, yet they are different […] in conception, in their character and status, and in content' (Henkin, The Age of Rights, 143). See, also, Loughlin, Foundations, 343ff.

Simultaneously, this legal transformation kindled a second phenomenon, (ii) the creation or growth of judicial review,[27] at least for most of the world. Both these changes implied (iii) a new under- standing of the burdens governmental action shall be subject to.[28] Finally, these alterations entailed (iv) a revolution in the arena of litigation, which transited from the traditional litigation model to public law litigation.[29] These subjects will be referred conjunctly as the privatisation of public law, where debates which once were political turn to the courts to be settled in that forum. Privatization hence is not to be understood for this purpose as a 'private administration', since courts manifestly display public power. Privatization means that the discussion has been deviated from a public deliberation about the advancement of general interest to a privately oriented analysis of individual interest, framed in the language of rights.[30]

4.1. Towards a new conception of rights

[27] This transformation was for the most part materialized on a later period, mainly in the period spanning between the 1980's and late 1990's. See for example, on an account of Canada, New Zealand, Israel and South Africa: 'Four Constitutional Revolutions' Ran Hirschl. Towards Juristrocracy (Boston: Harvard University Press, 2004.

[28] Loughlin, Foundations, 369–70. 'In modern constitutional settlements, the basis of rights theories has dramatically shifted. Rights are no longer conceived as defining a zone of individual autonomy freed from governmental interest. Rights are now conceived to be part of the objective organizational principles of the constitutional order that has been instituted […] The juristic consequences are profound. First, the nature of the relationship between rights and law is transformed. Once conceived as a species of command that imposed constraints on pre-existing liberties, law itself increasingly comes to be treated as a species of right. Rather than being seen to be the outcome of an exercise of will, law comes to be treated as an elaboration of reason. Rather than being treated as an order of rules, law is viewed as a configuration of principles. But that is not all. Constitutional rights can no longer be seen to guarantee a liberty 'pure and simple'. There can be no such thing as an absolute right: since all constitutional rights must be conceived as promoting certain purposes, the right exists only to the extent that it aids the realization of those purposes. All constitutional rights become conditional […] their existence and exercise increasingly appears to depend on positive action by government'. Also, Loughlin, The Idea, 127–8.

[29] Chayes, Abram. "The role of the judge in public law litigation." Harv. L. Rev. 89 (1975): 1281.

[30] The idea of courts limiting public power in defense of private rights is a far from novel locus, certainly not novel in its structure. The turn to privatization hence is not so patently a variation in the structure but on the narrative that it provides. It is not in the fact that the courts control public power that the attribution has been 'privatized', but in the heightened manifestation of this control. The material symptoms of this reordering are an unprecedented growth of the aspects of control, the level intromission granted to courts in the revision of policies (controlling substantive aspects of the decisions that were formerly out of their jurisdiction), and, as we will see, in the possibility not only to stop governmental intromission, but demand state action or state provision of goods.

For one part, the adjustment on the conception of rights, resulted on a new subjective entitlement, a 'right to demand social benefits' (*Anspruch auf Sozialhilfe*).[31] The turning of the focus of public law towards individuals – under the conception of a state at the service of individuals – generated an expansion of the actions legal orders afforded their citizens.[32] Perhaps one of the reasons this mutation has been transversally celebrated is that both centre-left and center-right wing political parties endorse it. For one part, the political right has been grateful for the restoration of privately owned rights, in particular the extensive protection given to the right to own private property and, for the other, the political left has expectantly embraced the possibility of obtaining so called 'social rights' amid the aid of courts.[33] Furthermore, prospering in this crusade, the limitation of governmental action formerly portrayed by courts' negative authority (the authority to declare an action illegitimate for exceeding its scope) evolved into a newfangled positive authority to demand the executive the performing of certain pol- icies.[34]

[31] Wahl, Herausforderung und Antworten, 23 (translation is my own).
[32] Wahl, 24, who explains it due to a guarantee of judicial protection with no gaps in the law (Garantie des lückenlosen Rechtschutzes). This legal idea is based on a new conception of the legal subject: the legal subject is only recognised as such when she or he has a right and that right has an associated legal action to demand the intervention of a court (die Grundgedanken, dass der einzelne Subjekt, Rechtsubjekt ist, ab: Nur wer tätsachlich Rechte hat und […] diese Rechte eingeständig vor einem Gericht geltend machen und durchsetzen kann).
[33] Gerald Rosenberg, ''Much Ado About Nothing'?: The Emptiness of Rights' Claims in the Twenty-First Century United States', Studies in Law, Politics and Society, 28, 1 (2009). For a part of the progressives, some of these aspirations seemed to materialise ephemerally in the U.S.'s Supreme Court Goldberg v. Kelly (1970). In Goldberg the Court said that the government could not cut-off a financial aid programme without Due Process of law (qualifying the benefits as entitlements rather than privileges), which in that case implied a right to an oral hearing before the suspension. Nonetheless, the Court shut the door for such an expansive (and constitutionally doubtful) view of the Due Proces (asserting an oral hearing was not required) on Mathews v. Eldrige (1976) which versed about the termination of disability benefit payments.
[34] For example, consider the paradigmatic Brown v. Board of Education of Topeka 347 U.S. 483, 1954 in relation to Brown v. Board of Education of Topeka II 349 U.S. 294, 1955 where the Court established that schools were to be desegregated 'with all deliberate speed' and tasked the Federal Courts with the duty of supervising the process. The subsequent implementation was carried out locally and required active efforts to break the heavily segregated status quo. See for example the polemic over the 'busing system' by which the court demanded the transfer of black and white students to schools located in other neighbourhoods to break the effects of the segregated housing patterns in Swann v. Charlotte-Mecklenburg Bd. of Education (1971). For a historical account showing the bottom-up arousal of the resistance see: Lassiter, Matthew D. 'The suburban origins of 'color-blind' conservatism: Middle-class consciousness in the Charlotte busing crisis', In The Best American History Essays 2006, pp. 263–93. Palgrave Macmillan, New York, 2006.

Under this novel conception, courts asserted not only what the government was forbidden to do but, also, what it ought to do. So, citizens could demand further welfares from the state and disposed of newly minted judicially enforceable actions to do so.[35]

4.2. Judicial Review

Nowhere could the change of paradigm in the conceptual and institutional notion of rights be more readily seen, that in the proliferation around the globe of *judicial review* regimes during the second half of the twentieth century. Echoing common narra- tives that give a prominent place to the traumas of World War II as a motivation for insti- tutional reform, Ginsburg has argued that 'before World War II, only a small handful of constitutions contained provisions for constitutional review, as of this writing [2008], 158 out of 191 constitutional systems include some formal provision for constitutional review.'[36]

Out of these 185, the particular situation of the power of judicial review vested on the Supreme Court of the United States of America at its genesis,[37] has been a recurrent object of scholarly debate. It is enough for the purpose of this article to endorse McClos- key's claim that the 'great questions of the Court's proper role is not susceptible of any single, final

[35] On the 'blocking –saying what the government can and what it can not do remains the Court's primary function. By the mid -1960's, however, the Court increasingly was willing to say not only what the government could and could not do – but also to tell the government what it must do as well' See, Silverstein, Gordon. Law's Allure. How Law Shapes, Constrains, Saves, and Kills Politics (Cambridge: Cambridge University Press 2009), 43.
[36] Tom Ginsburg, 'The Global Spread of Constitutional Review', in: The Oxford Handbook of Law and Politics, Oxford: Oxford University Press (2008), p. 81. Some years later, Ginsburg (working with Versteeg), changed the explanation for the adoption of judicial review, from an ideational narrative to an explanation based of electoral politics. In any case, this work still recognises that the clear majority of systems of judicial review around the world, were adopted after World War II. See, Tom Ginsbur and Mila Versteeg, 'Why do countries adopt constitutional review?', Journal of Law, Economics and Organization (2015).
[37] Or, more precisely, with the assertion of the Court's power of judicial review on the famed 1803 Marbury v. Madison 5 U.S. (1 Cranch) 137.

answer.'[38] The United States' unique constitutional history is the result of the 'set up [of] popular sovereignty and fundamental law as twin ideals [although leaving] the logical conflict between them unresolved.'[39] In a peculiar fashion, this tension is a part of the history of the nation's formation. But, also, the particular history of the United States' Supreme Court did not occur in a vacuum and it too was deeply transformed by the repercussions of the twentieth century.

The American Supreme Court was established by the dictation of the Judiciary Act of 1789 but it was not until 1790 that the men who were appointed justices gathered as the Supreme Court of the United States for the first time. Curiously, only four of the six judges that were selected to the commission attended that official meeting. Thirteen years later, the Supreme Court's authority of judicial review was first pronounced in the famed decision of 1803 *Marbury v. Madison.*[40] The story that followed is that of an entity struggling to find, and create, its place within the American political and legal order.[41] In spite of the protagonist role the Supreme Court has played on the American imaginary, saved counted exceptions,[42] it has 'seldom strayed very far from the mainstreams of American life and seldom overestimated its own power resources.[43]

This is in part the reason why only after the twentieth century World Wars traumas the Court became decidedly more right-focused. As Loughlin has stated:

> The most important point to note about the rights revolution in the United States is how recent a

[38] Robert C. McCloskey, The American Supreme Court, Sixth Edition: Revised by Sanford Levinson, (Chicago: The University of Chicago, 2016).
[39] McCloskey, The American Supreme Court, 16.
[40] 5 U.S. (1 Cranch) 137 (1803).
[41] For a thorough depiction of the struggling process see: McCloskey, The American Supreme Court.
[42] See for example Lochner v. New York.
[43] McCloskey, The American Supreme Court, 292.

> phenomenon it is. Only after the First World War did the Supreme Court start—and then only fitfully—to apply the provisions of the Bill of Rights against the states. In 1938, flowing from the New Deal controversies, it signaled a significant shift when indicating that, while it would defer to legislative action concerning economic regulation, it would engage in more intensive scrutiny of such action impinging on personal liberty. But the rights revolution itself is a post-Second World War phenomenon […]. This post- war development has resulted in constitutional rights claims becoming the most important and contentious aspects of the contemporary US Constitution. In turn, it has led to a fundamental change occurring in the role of the Supreme Court: whereas in the mid-1930s, fewer than 10 per cent of the court's decisions related to individual (non-property) rights claims, by the late 1960s, almost 70 per cent of its decisions were concerned with individual rights. The Supreme Court has come to conceive itself as a constitutional court and in that capacity to assume as its primary role that of guardian of the citizen's constitutional rights.[44]

In this sense, though the historic development of the American judicial review in general has had a different chronology than that of the rest of the world, the focus of the constitutional debate on the centrality of individual rights appears to have developed together with the global trend. The trauma of World War II permeated the American imaginary – including its legal and judicial culture – [45] as much as that of the globe in general for which the rule of rights in regards to judicial review can be deemed a worldwide phenomenon.

4.3. New relation between the judiciary and the executive power

The third consequence of these new ideas was that a new equilibrium among the state powers favored the judiciary as the ultimate constitutional decision maker. This altered the traditional power structure not only through judicial review but also through the transformation of legal thought and procedures. Though the notion of checks and balances had long influenced political thought, comprehensive judicial control over the decisions of

[44] Loughlin, Foundations, 358–9. In the same sense, Louis Henkin, The Age of Rights, 116–21.
[45] In relation to the American constitutional discussion, Rosenberg asserts 'World War II appeared to revive rights as a force for progressive change', See: Rosenberg, 'Much Ado About Nothing?', 6.

the legislative and the executive were not conceived as part of the mutual supervision. The paradigm introduced in the post-war era places the constitution at the centre of the evaluation of the executive's use of power. Legal thought evolved to a constitutional analyses that became thus 'composed of standards for the assessment of the rationality and reasonableness of any government action against the normative background constituted by the value order.'[46] This principled transformation was enacted by requiring the actions of the executive to meet the *proportionality* standard, a judicial evaluative criteria of necessity in relation to the fundamental rights the action is affecting.[47] Because this new understanding almost inevitably meant that several rights would conflict on the judicial arena, proportionality offered a sensible tool to resolve the tensions.

Of course, although less frequently, rights as well as conflicts among them certainly existed before the privatization of public law. Nonetheless, their clash was somewhat obscured under the rigid categorizations of the formerly dominant legal thought. Nineteenth-century jurists (as did their predecessors') often rejected to characterise a legal issue as a direct conflict between rights and preferred to contend the legal issue in a different form. For nineteenth-century legal minds, disputes ought to be resolved appealing to 'differences of kind' among legal classifications whereas for twentieth-century jurists, in the era of ponderation, legal issues essentially pertained a 'difference of degree.'[48]

Thus, the new ideals materialized into a heightened position of judicial control over the

[46] Alexander Somek, The Cosmopolitan Constitution (Oxford: Oxford University Press, 2014), 16.
[47] Somek, The Cosmopolitan Constitution, 17.
[48] Horwitz, Morton J. The transformation of American law, 1870–1960: The crisis of legal orthodoxy. Oxford University Press, 1992, 17.

acts of the administration,[49] repugnant of the previously afforded leisure that was granted to the other branches of government by allowing them a discretionary decisional margin.[50] Two cases from different jurisdictions usefully illustrate this variation. The first is a French case that consisted on the judicial annulment of a declaration of 'public utility' issued by a newly-created rural municipality that ordered the expropriation of a parcel to develop a municipal project. The court alleged the expropriation did not correspond to one of public utility because the municipality had other lands in which it could carry out the project in equivalent conditions.[51] Notwithstanding the fact that the municipality had complied with the procedural aspects of the public utility declaration, and intended to expropriate the lands to develop a public project, the court estimated it shall be annulled because it esteemed there was a less onerous alternative. The court reached its decision despite the fact that the municipality had considered the 'alternative' (proposed by the court) but discarded it because it esteemed it didn't serve the project's purpose quite as well as the proposed one.[52] What is notable about this form of legal reasoning is that the court incorporated ponderation to the reasoning of determining public utility, an otherwise binary concept. Hence, the court demanded for the determination of public utility the ponderation of the different values at stake (which the municipality had already done, even if the evaluation did not satisfy the court.) On the basis of an affected right (the landowners') the court pondered whether the determination of the

[49] A powerful account on this issue can be assimilated from the Chilean case. See: FerradaBórquez, J.C., 'La progresiva constitucionalización del poder público administrative chileno: un análisis jurisprudencial', La constitucionalización del derecho chileno (Santiago: Editorial Jurídica de Chile, 2003) 2003, 63ff.
[50] Wahl, Herausforderung und Antworten, 24.
[51] 'C.E. 3 avr. 1987 Consorts Métayer et Époux Lacour, Rec. 121; C.J.E.G. 1987. 790, concl. Vigoroux; A.J. 1987.549 obs. Prétot; R.F.D.A. 1987.531, note Pacteau: absence d' utilité publique parce que la commune disposait déjà des terrains nécessaires pour l'exécution de son projet' in: Long, Marceau, Prosper Weil, Guy Braibant, Pierre Delvolvé, and Bruno Genevois. Les grands arrêts de la jurisprudence administrative. Dalloz, 2015, 33.
[52] Following a similar rational the Council of State annulled a declaration of public utility by which the French authority intended to expropriate a number of parcels that would as a consequence impede the future expansion and adequate green areas use of a Psychiatric hospital. JCP 1973.II.17470.

municipality (in the name of the public) was justified.

The second is a Chilean decision in which the Supreme Court struck down a resolution in which a municipality that ordered the construction of a bike-lane as part of its plan to address the air-pollution crisis the county was facing.[53] The court decided the municipality's act had been arbitrary because it defined the location of the bike-lane next to the street surrounding some residences' front gardens, whereas at the other side of the canal that followed the houses there was an empty patch. The municipality for its part had reached its decision complying with every procedural requirement and alleged it had considered both emplacements but opted for the challenged one due to monetary restrictions. Here again, the Court incorporated in its reasoning the ponderation of conflicting rights (the right to have a less-polluted city and the right to have a garden in front of one's residency) which led it to struck down the plan because on its ponderation the budgetary constraint did not seem to tilt the scale as in the municipality's decision.

4.4. Public Litigation

This new form of adjudication has not only altered the role private rights play in legal thought but has transformed the very syntax of litigation. Chayes referred to this conversion, on his seminal paper on the matter, as the rise of public law litigation.[54] The traditional private litigation model in which one individual confronted another in an adversarial context to settle a dispute had been replaced by public law litigation.[55] The characteristics of the parties of a dispute had shifted from individuals with concrete binary right-based claims to a much broader category

[53] Chile Supreme Court, Ciclovías de Rancagua, 06.27.2013, Rol 2272-2013.
[54] Chayes, Abram. 'The Role of the Judge in Public Law Litigation', Harv. L. Rev. 89 (1975): 1281.
[55] Chayes, 'The role of judge', 1282.

of interested parties 'not rigidly bilateral but sprawling and amorphous.'[56] Similarly, the fact inquiry was now not historical but predictive, the judge not passive but active, the relief not conceived as a compensation for past wrongs but an ad hoc forward looking solution.[57] But perhaps the most conspicuous feature of public law litigation is its object: 'not a dispute between private individuals about private rights, but a grievance about the operation of public policy.'[58] Nonetheless, given that this grievance is expressed in the judicial forum, the questions is still framed as one of conflicting rights (and not of 'public problems'). While agreeing with Chayes' depiction of public law litigation,[59] contrarily to his view we believe it lacks the institutional structure to portray an adequate 'visible arm of the political process.'[60] The reason for our discontent with this alternative is that it relies on the representation of all the interests at stake (or as many as possible) to come up with a solution, but the problem is inevitably framed as one of a sum of separate interests. This inevitably transforms the issue into a non-structural problem. The case of desegregation of public schools in the U.S. can be illuminating to this respect: as the problem was framed as one of private interests, the solution was to transport kids to faraway

[56] Chayes, 1302.
[57] Ibid.
[58] Ibid.
[59] Notwithstanding the fact that Chayes' paper was published in Harvard Law Review in the year 1975 it seems as though his characterisation has only grown more accurate and is today a very sensitive description of modern litigations. Nevertheless, some of its premises have been debilitated by judicial doctrines such as the requirements of standing. See: Nichol Jr, Gene R. 'Justice Scalia, Standing, and Public Law Litigation.' Duke LJ 42 (1992): 1141. Another revisionist approach of public litigation can be seen in the experamentalist intervention model: Sabel, Charles F., and William H. Simon. 'Destabilization rights: how public law litigation succeeds', Harv. L. Rev. 117 (2003): 1016. Although Charles claims his model is more democratic in that it allows previously marginalised stake-holders to participate and the judge does not occupy such a central position. Still, the framing of the problem is still framed as one of 'adding individual interests'.
[60] Chayes, 'The role of', 1303. For a more recent reflection on the possibilities of public litigation, see Schuck, Peter H. "Public law litigation and social reform." (1992): 1763, which reviews Gerald Rosenberg's The Hollow Hope and Gerald Lopez's Rebellious Lawyering and their common reflection over the court's inadequacy 'in producing enduring social
change', 1784.

schools (hence, solving their individual cases) in buses. If the issue was framed as a structural public problem, the solution could have been for instance (perhaps in addition to the bus policy) developing a comprehensive plan with measures such as real state subsidies to integrate neighborhoods and diminish urban racial segregation.

In the judicial forum, the question for the public good or what would be good for the community as an entity distinct from the mere sum of the individuals cannot be held because the structure is unescapably devoted to the resolution of the conflict of particular interests.[61] The framing of the problem in the court setting as one that can be solved if we somehow domesticate the invisible hand that coordinates our different interests, trumps our political imagination as it does not admit the question for a common good.

Chayes denounces our critique amounts to no more than 'to impose democratic theory by brute force on observed institutional behavior' but we contend that believing Congress is a mystical forum in which the public good automatically arises is as naïve as thinking that congressional action amounts to no more than pure manipulation is cynical.[62] We do not argue that Congress has a magic aura that allows it to pursue the public good but only that its institutional structure makes the framing of the question in such terms possible (or at least much more likely than it could in a court).[63]

From a different perspective Alon Harel agrees with Chayes on his positive valuation of public law litigation. Harel argues that there is a non-instrumental reason to defend the courts as

[61] A particular interest does not necessarily have to belong to one individual, several interests can be predicated to belong to a group of individuals but still be particular on their form. For example, an interest on having companies relate in good-will towards their consumers can be slightly different from the sum of consumers interests not to be deceived by a company.

[62] Chayes, 'The role of', 1311.

[63] For an extensive discussion on the nature of adjudication and legislation from this perspective see: Atria, Fernando. La forma del derecho. Madrid: Marcial Pons, 2016.

a space to hear about people's rights because they constitute a space in which individual grievances can be heard and considered in good faith.[64] This exercise portrays a particular form of recognition of human dignity. While agreeing with Harel on the importance of incorporating individuals – and their grievances – as concerns for collective decisions, I believe there are other institutional alternatives that do not obstruct as much collective projects. Individual grievances should be incorporated to the process of deliberation so as to improve our conceptions of public good and the ways in which we pursue them.

5. Reflections on a common syntax: the age of rights

The roles constitutional courts perform today in countries all across the globe share a common syntax in which judicial review, whether vested on a Supreme Court or a special tribunal, is given the responsibility of defending individuals against unlawful public action. The privatization of public law, that is, the new conception of rights and the re-ordained relation of the judiciary with the executive, operates analogously, par- ticularly in public law litigation. Advocates of public law's new rationale celebrate the successful advance of rights against (the oppressive) public power that, allegedly, would have individuals at its mercy if it were not for that conceptual construction.[65] Yet, this reading disregards the privatising undercurrent that the rule of rights conceals. As Pizarnik's image mentioned in the dedication to this paper so potently presents, the threads of the modern institutional structure burden the judges with the role

[64] Alon Harel, Why law matters (Oxford: Oxford University Press, 2014).
[65] The concept of rights has expounded not only its legal scope but its symbolic and political importance. Thus, political discourse has been permeated by the assumption that a claim –in order to be legitimate- must be asserted in the form of 'a right'. For a thorough exposition and critique on this transformation see: Rosenberg, 'Much Ado About Nothing?'. On a similarly critical account, see, Mary Ann Glendon, Rights Talk: The impoverishment of political discourse, (New York: The Free Press, 1991).

of accounting for a silence – the political silence contained in the absence of a common space of deliberation.

The rule of rights institutionally expresses that the decisions taken by the legislative and the executive do not only need to comply with procedural enactments to be legitimate but, more importantly, need to conform to the substantive limits that their authority ordains.[66] Hence, the 'traditional focus of political thought – on the rights of sovereigns and the duties of subjects – has been inverted, the emphasis now being placed on the rights of citizens and the obligations of government.'[67]

The institutional scheme erects these substantive limits in the form of unsettled values – v.gr. discrimination, property, liberty – whose concrete expounding corresponds to the courts. Two illustrative examples from the U.S. Supreme Court aid to sketch the difficulties the constitutional exegetical labor renders. Consider on this point, first, the Court's concept of 'penumbras.'[68] The idea of constitutional penumbras endures that despite the fact that some rights are not explicitly recognized by the Constitution,[69] they can nevertheless be inferred from the penumbras of the rights it explicitly grants.[70] The second example pertains the XIV amendment according to which no state 'shall deprive any person of life, liberty, or property without due process of

[66] Loughlin, The Idea, 113.
[67] Ibid, 114.
[68] Griswold and Connecticut. 381 U.S. 479 (1965).
[69] In the U.S., the modern debate pertaining the inclusion of inferred rights was triggered by Reagan's nomination of Robert Bork to the Supreme Court who had previously published an article against the inclusion of 'inferred rights' in the Yale Law Review. Although the nomination was defeated the controversy on implied rights effervesced as never before. The source of the controversy was the article: 'Neutral Principles and Some First Amendment Problems', 47 Indiana Law Journal 1 (1971).
[70] See also Skinner v. Oklahoma were the Supreme Court struck down an act pertaining criminal sterilisation for the act failed to meet the limits imposed by the equal protection clause in relation to 'one of the basic civil rights of man[:] marriage and procreation' which is not explicitly covered by the constitution.

law'. The U.S. Supreme Court has asserted that the 'due process' clause involves not just the right to a 'process' but that the amendment prohibits certain deprivations of rights notwithstanding how 'due' the process that deprives them may be.[71] The former examples intend to show the duskiness of the rule of rights' limits.

The difficulties of defining what the proper role of courts should be in the context of a rule of rights have revived the discussion over the wisdom of judicial review. Albeit some of the arguments outlined by both detractors and supporters of judicial review differ from the ones we expound here, relative to the privatization of public law, both share a common foundation. In order to present a principled response to the recent alterations in the idea of public law, we will explore the institutional conundrum regardless our preferred outcomes on particular cases.[72] As the object of this essay is not to warily analyze each of these arguments, it will be enough to focus on to what from our perspective is the core principled dispute that serves as a standard to refer both issues: the democratic menace.

Perhaps the most frequently presented quarrel against judicial review is that the so-called constitutional rights lack a univocal meaning for judges to uncover. Conversely, the extent of such rights depends on political determinations. To this respect, Waldron argues 'the consensus about rights is not exempt from the incidence of general disagreement about all major political issues,'[73] therefore, 'substantial dissensus as to what rights there are and what they amount to' can reasonably be expected.[74] In these order of thoughts, judicial review

[71] See for example Loving v. Virginia, 388 U.S. 1 (1967) or Obergefell v. Hodges, 576 U.S. (2015).
[72] Thus ignoring the fact that 'for many Americans the Court is the echo of the Constitution when it agrees with them and the voice of subjective prejudice when it does not', McCloskey, The American Supreme Court, 16.
[73] Jeremy Waldron, "The Core of the Case against Judicial Review", The Yale Law Journal 115, no. 6 (2006), 1366.
[74] Waldron, 'The Core of the Case', 1367.

detractors argue that the judicial power lacks the institutional conformation to resolve this issues.[75] In accordance to the separation of powers, the authority to determine the means by which society will pursue the common good pertains to the legislature and the executive. The essential political definitions of society must be resolved by the democratic process, impersonated on those two powers.

In middle ground, some critics of judicial review have argued judicial control over the acts of the legislative and executive power should be limited to a more formal or procedural type of control.[76] This would imply a revision only of the structure and pro- cedures of official acts but not the reasonableness or content of the decisions. According to its proponents, a procedural form of judicial control would not only honour the democratic legitimacy inherent to the separation of powers, but in some stronger versions, judicial control would actually be an aid in the deliberative process of democratic will formation and self-government by 'policing the process of representation' –the representation of all groups, especially minorities, in the functions of government– and 'clearing the channels of political change' –through the protection of rights of association, voting rights and free speech.[77]

[75] Among others, see: Mark Tushnet, Taking the Constitution away from the Courts, (Princeton:, N.J. Princeton University Press, 1999); Jeremy Waldron, The Dignity of Legislation, (Oxford: Oxford University Press, 1999); James Allan 'Bills of Rights and Judicial Power- A Liberal's Quandary', Oxford Journal of Legal Studies, 16 (1996), 337.352.

[76] It is worth noting these tendency has not been developed all over the world nor with the same force. The U.S., for one, is a case where a procedural approach to control of the executive seems to be, with some qualifications, already in place. See: Vermeule, Law's Abnegation.

[77] I referring here to John Hart Ely, Democracy and Distrust. A Theory of Judicial Review (Cambridge: Harvard University Press, 1980) a work which remains unsurpassed in articulating the best case for a procedural judicial review. His position of 'mutual reinforcement' between democracy and judicial review is clearly articulated when he states that 'the way in which what are sometimes characterizes as two conflicting American ideals –the protection of popular government on the one hand, and the protection of minorities from denials of equal concern and respect on the other– in fact can be understood as arising from a common duty of representation' (Ely, Democracy and Distrust, 86–7).

Against the counter-majoritarian argument, defenders of judicial review respond that the proscription of it would be a greater threat to democracy. The argument rests on the idea that democracies comprehend not only procedural aspects but also involve certain material components. Chiefly, they adduce that in a constitutional democracy the legislative power as well as the executive need to conform to the constitutional constraints imposed upon them and, in particular, that they cannot justify any decision on the common good based on arguments which deny recognition to individual rights.[78] For this vision, the substantive components of a democracy are as decisive as the procedural: they ascribe a government of partnership instead of a government of majority.[79]

Notwithstanding the desirability of the majoritarian position (in favor of procedural and substantive judicial review) we are not convinced by it because to an important extent it implies entrusting the judiciary with the determination of what our fundamental collective values ought to be. To this extent, it goes against the dignity of the democratic process that recognizes all citizens

[78] The most influential of these statements is Ronald Dworkin, 'Rights as Trumps', Jeremy Waldron, ed., Theories of Rights (Oxford: Oxford University Press, 1984), 153: 'Rights are understood as trumps over some background justification for political decisions that states a goal for the community as a whole.' Jeremy Waldron has warned that Dworkin's position is a sophisticated version of the rights theory, which does not give 'simple protection for certain individual interests against demands of the common good', but which 'constraints the sort of reasons that governments may legitimately act upon'. Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights', The Journal of Legal Studies 29, no. 1(2000), 301. Nevertheless, the implications of this difference for the factual operation of judicial review remain for me unclear.

[79] On Dworkin's account, the competing formulations are those of a democracy of majority and a democracy of partnership: 'According to the majoritarian view, democracy is government by majority will, that is, in accordance with the will of the greatest number of people, expressed in elections with universal or near universal suffrage. There is no guarantee that a majority will decide fairly; its decisions may be unfair to minorities whose interests the majority systematically ignores. If so, then the democracy is unjust but no less democratic for that reason. According to the rival partnership view of democracy, however, democracy means that the people govern themselves each as a full partner in a collective political enterprise so that a majority's decisions are democratic only when certain further conditions are met that protect the status and interest of each citizen as a full partner in that enterprise. On the partnership view, a community that steadily ignores the interests of some minority or other group is just for that reason not democratic even though it elects officials impeccably by majoritarian means.' Ronald Dworkin, Is Democracy Possible Here? Principles for a new political debate, (Princeton: Princeton University Press, 2006), 131.

as equal and not just the ones occupying the bench, institutionally inapt to endeavor on their newly crafted obligations. Former U.S. Supreme Court's Justice Robert Jackson's famed concurring decision in a mid-twentieth century case articulates the institutional conundrum lucidly by acknowledging 'we are not final because we are infallible, but we are infallible only because we are final.'[80] Recognizing there is no way around our fallibility, the recognition of the dignity of every individual as a political agent should constitute a crucial institutional end. In a representative democracy this goal is better performed by the politically accountable branches, not by the bench.

6. The Erosion of the Public

A democratic form of government ruled by the majority, rather than a partnership, does not only entail a more legitimate form of political dispute resolution in which all participate (in a representative democracy, through their representatives), but correspondingly augments a procedural structure that enhances the public. To Hannah Arendt the term public enclosed two distinct but interrelated meanings. First, 'everything that appears in public can be seen and heard by everybody and has the widest possible publicity' that is, the public is to an extent what is apprehended by the senses in a non-private scenery. The second corresponded to 'the world itself, in so far as it is common to all of us and distinguished from our privately owned place in it.'[81] This public world is not identical to nature as in a place for biological life but '[i]t is related

[80] Brown v. Allen (1953) 344 U.S. 443.
[81] Hannah Arendt, The Human Condition, Introduction by Margaret Canovan, 2nd Ed. (Chicago: The University of Chicago Press, 1998), 52.

rather to the human artifact, the fabrication of human hands.'[82] Though the rule of rights might not necessarily affect the public upon its first definition I believe it erodes what's public in the latter sense.

For Arendt, in this second sense, '[t]he public realm, as the common world, gathers us together and yet prevents our falling over each other.'[83] Nonetheless, by consequence of the disintegration prompted by mass society, it has lost its power to gather together, relate and separate men.[84] The rule of rights portrays an institutional expression of this lack of a common world, intensifying the paramount consequences Arendt accused mass societies of bringing forth.

The judicial determination of our society's core values extends the subjectivity of privacy on to the public realm without converting it for that reason to a public one, because '[t]he subjectivity of privacy […] can never replace the reality rising out of the sum total of aspects presented by one object to a multitude spectators.'[85] The public forum in a democracy is the setting where all the perspectives are exposed and where the spectators 'see sameness in utter diversity;'[86] a space from which a common world may rise. This is the political forum institutionally portrayed in the politically accountable parliament and executive. The rule of rights distinctively leaves to a private appreciation, rather than public, the determination of what is a right, that is, what is due to each and every one, in Ulpian's famous formulation.[87]

[82] Arendt, The Human Condition, 52.
[83] Arendt, 53.
[84] Ibid.
[85] Arendt, 57.
[86] Ibid.
[87] D. 1.1.10.

The structure of the judicature itself, and even more of the adversarial process in which the issues are discussed, demand the argumentation from a particular standpoint, a justification in private harm and private interest, in which perspectives do not dialogue with each other but rather confront and in which the outcome is seen as a zero-sum game. In this setting, the contenders' attitude can only be strategic. There is no place in trial for communicative action oriented towards understanding.[88] Judges are asked, to use Arendt's figure, 'to prevent us from falling on each other' in circumstances that they erode –by particularizing and privatizing– public disputes, precisely what purports to have us coming together.

By definition, the judicial process confronts two (or more) parts who claim their perspective adequately interprets that of the general will and demand that an authoritative decision settles the dispute. This structure's legitimacy presupposes the process will lead to a resolution that reflects the correct interpretation of the norms, or at least tends to do so. To some degree at least then, the judicial process presupposes norms and policies – deliberated by and in the public– and (*pace* Kelsen) the labor of the judge is not as original as that of the other branches, in that it assumes the existence of these norms in order to have a sphere of action.[89] The rule of rights depreciates the labor of the judge by imposing upon him the duty of stabilizing the legitimacy of such norms and policies, for which he recurs to his –only institutionally available– private subjectivity.[90] Addition- ally, the development of public policies

[88] For a difference between strategic action oriented to success and communicative action aimed at understanding, see, Jürgen Habermas, The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society (Boston: Beacon Press, 1987), 285–287.
[89] In Kelsen's view, judges would create law and the difference with legislators would be only a question of degree. Hans Kelsen, Pure Theory of Law, trans. Max Knight (Clark: The Lawbook Exchange), 234.
[90] This is, at best, her private appreciation of what that general interest or shared norms are. If not her own preferences directly, what she perceives are the preferences of the majority. Such an endeavor far exceeds her institutional possibilities as she lacks the tools to make that determination in a democratically sound way.

through this institutional forum furthers this privatized understanding, as we think about problems as individual grievances and not public questions. Instead of publicly debating on what it is a just society demands and how to allocate the costs of such decision, judges end up answering public questions from an inevitably myopic perspective. Therefore, the privatization process that legal institutions have transited is not a privatization of law alone but of our common world in itself.[91]

7. Conclusion

The transformation legal systems have suffered during the last seventy years is far from novel. Though the changes have not occurred in the same manner, nor at the same time across the several nations that conform the globe, there is a general tendency towards the judicialization of conflicts and a diminishment on the deference the judiciary shows for the matters pertaining to the other powers of the state. The ideals that once inspired the rule of law have been notably transmuted by this institutional reconfiguration, to a point where the principles that inspired them have become unrecognizable.

Concluding a brief account on the global tendencies of both judicial review and the privatization of public law, I believe it is patent that the democratic and political questions upon the reign of rights are as vivid as ever. The idea of a rule of rights encompasses a severely anti-democratic restraint. But further, it erodes the sole idea of a public forum by distorting the

[91] Robert, Cover M. 'The Supreme Court, 1982 Term; Foreword: Nomos and Narrative', Harvard Law Review 97, no. 1 (1983), 4–7.

structure of the public space. It inhibits the world we inhabit to become a space shared by the community, instead of a sum of subjective perspectives. It hinders our capacity to imagine the political as something different than the contact space of individual private interests. Privatizing law is consequently a means of privatizing common existence, for it implies the subjectivization of the sphere where we once addressed our political questions in common. The ultimate effect of this privatization is that it not only hinders our democratic procedures but the bare possibility of thinking about collective problems. By treating every problem as an individual issue, our political imagination is trumped and, with it, our collective imagination. If we fail to recognize each other as part of a community at least in some respects, our communal existence becomes impossible.

III. FEMINISM WITHOUT ROE

Abortion has made an indelible mark in American history. When the Supreme Court overturned Roe last June in Dobbs, feminists' legal legacy seemed in ruins. In response, have incessantly and fiercely fought to defend women's right to abortion. However, playing defensive has left little room for other feminist demands. This piece is a historical reminder that it need not be that way. Indeed, rich and capacious feminist activism has been—and remains—possible without Roe.

In this article, I offer a note of hope through a history of feminists' legal imaginaries. I revisit activists' projects during the 1960s and 1970s and describe a moment of "feminist freedom" in which feminists' legal imaginary was wide open. Conscious of that time's diverse feminist milieu, the article focuses especially on the National Organization for Women (NOW)—the largest and most moderate feminist organization—, whose members creatively used the law as a toolkit to pursue a new social order. For NOW, bringing women into the American mainstream meant revolutionizing social and economic structures to overcome gender oppression (through popular day cares, legislative demands, labor groups, media pressure efforts, etc.). This is the story of how a previously marginal aspect of feminists' fight for freedom displaced the constellation of demands that once undergirded their quest. I show that during the 1970s abortion was simply not feminists' foremost demand and, to the extent it was, it was uttered in quite different terms. Abortion was one more instance in which women reclaimed their freedom, tightly connected to other questions of social and economic equality.

The article traces how activists shifted from a capacious and multifaceted legal imaginary (during "feminist freedom") onto abortion as a single issue (giving rise to "Roe feminism"). In the process, not only did activists' agendas change but the very grammar of abortion was transformed as it increasingly became a stand-alone demand. Throughout this transition, feminists did not merely follow external pressures when they partook in a single-issue fight for abortion. For that move to be possible, activists needed to first re-align behind the Equal Rights Amendment (ERA). The ERA was uniquely situated to become feminists' single-issue because of its historical significance and its ability to address sex discrimination in multiple areas. Thus, when the ERA's clock ran out NOW turned to abortion to serve as the issue that condensed all other issues. Inadvertently, with it, activists reimagined their aspirations as matters of choice, devoid of the

material conditions that had for so long loomed in their political imaginary. Recovering this history is imperative in a world without Roe, not least because it reminds us of the myriad ways in which the law remains to be found as a tool for feminist change.

1. Introduction

It would be just a slight exaggeration to say that every public discussion about feminist demands in the United States starts (and perhaps even ends) with abortion. For decades, the "right to choose" has stood as feminism's most conspicuous demand. At the same time, abortion represents broader questions about women's autonomy and self-determination. Despite criticism from reproductive justice advocates[1]—who consider the right to choose to be too limited—abortion remains a metonymy for feminism in public discourse.[2] Perhaps even more so after the

[1] The advent of "Reproductive Justice" in the late 1990s pushed back on the narrowness of abortion as a stand-alone demand. The founders and proponents of the framework were: Toni M. Bond Leonard, Reverend Alma Crawford, Evelyn S. Field, Terri James, Bisola Marignay, Cassandra McConnell, Cynthia Newbille, Loretta Ross, Elizabeth Terry, 'Able' Mable Thomas, Winnette P. Willis, Kim Youngblood. *RJ Founding Mothers*, Black Women for Reproductive Justice (Aug. 8, 2012), https://bwrj.wordpress.com/2012/08/08/151 [https://perma.cc/NKQ8-F2FN]. Overall, the Reproductive Justice movement struggled to open the feminist agenda by incorporating larger economic considerations through the language of human rights, linking together the fight for reproductive rights and social justice. The earliest organization to use the term was SisterSong, founded in 1997, though the term had been coined by some of the organization's founders three years earlier**.** *See* Loretta Ross & Rickie Solinger, Reproductive Justice: An Introduction (2017)*;* The Reproductive Justice framework pushes for a more capacious version of reproductive rights which includes not only the right to have, or not have children but that to "parent the children we have in a safe and healthy environment." Nonetheless, the consideration of the issue in terms of individual rights, to an important extent focused on attending individual situations and grievances, as opposed to structural conditions and how to re-structure our communities, restraints the kinds of answers we dispose of. Today, reproductive Justice groups include, among others, Sister Song, The Afiya Center, Black Mamas Matter Alliance, In Our Own Voice.

[2] To be sure, in some respects at least, reproductive justice and its more ambitious platform has become mainstream. As legal scholar Melissa Murray has noted: in 2004 NOW's conference featured reproductive justice programming and '[b]y 2016, NOW's platform had a decidedly reproductive justice cast." Melissa Murray, "Race-Ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade," *Harv. L. Rev.* 134, no. 6 (2021): 2055-2056. It is debatable whether reproductive justice provides an adequate framework to confront structural conditions of oppression. For the present discussion, suffice it to note that it is the most capacious approach currently available. In that sense, despite reproductive justice's recent popularization, feminist organizations continue to focus overwhelmingly on abortion. At most, they include other issues rather than redefining their agendas towards a comprehensive approach that includes abortion access as one more instance of women's freedom. For example, in a newspaper response to Republican Marie Fischer, NOW president Christian Nunes stressed the strong link between

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

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

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abortion and poverty by compellingly emphasizing poor women are the most affected by abortion bans. Nonetheless, Nunes's remarks narrowed the discussion to abortion alone without calling for a transformation of the underlying conditions that led to that situation. Nunes wrote, "According to the Guttmacher Institute, 75 percent of women who seek abortion services are low-income and financial insecurity is the most commonly cited reason women seek abortion care" to this fact, she added that "*Women can't fully participate in our workforce or make the critical economic contributions this country needs* if they are forced to carry unintended — or non-viable — pregnancies against their will" (emphasis added). Nunes omitted from the equation the conflating factors that obstruct women's decisional possibilities as issues that need urgent attention; lack of childcare, healthcare, affordable housing, economic security, etc. Instead, she focused on women's individual possibilities to contribute as productive agents to the national economy, obscuring the gendered forms of valorization over what counts as a productive activity and the wage gap that persists even within remunerated occupations. This is not to say that abortion bans are not tremendously harmful to pregnant people. Instead, I want to emphasize how reproductive justice approaches do not yet ground mainstream feminist organization's common sense. Christian Nunes, "Abortion Is About All of Us," DC Journal, October 26, 2022 [Last accessed October 30, 2023], [https://dcjournal.com/point-abortion-is-about-all-of-us/?emci=092fd7d7-805b-ed11-819c-002248258d2f&emdi=ea000000-0000-0000-0000-000000000001&ceid=.]

[3] This is not to say, that there has been no feminist reflection outside the right to choose framework but to stress how pervasive that framework has remained. Interestingly, efforts to broaden the scope of considerations rightly charge

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

Legal and historiographical accounts and reflections on *Roe* have been numerous and substantial. Broadly speaking, *Roe* has figured prominently in discussions over the democratic adequacy of judicial review and as part of a wider reflection on rights and their institutional significance.[4] More specifically, legal scholars Robert Post and Reva Siegel have complicated

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contemporary mainstream feminists with underplaying economic factors. *See* Mikki Kendall, Hood Feminism (2020).

[4] There are multiple works that have reflected on the nature and suitability of the role of the judiciary in the United States' democratic scheme. *See* Jeremy Waldron, Law and Disagreement (1999). (making a case against judicial review for democratic considerations disagreement about rights ought to be processed through the political process); Mark Tushnet, Taking the Constitution Away from the Courts (2000) arguing in favor of a populist constitutional conversation in which the judiciary holds no institutional privilege grounded on a minimum set of agreed upon values he calls the "thin" constitution); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2007). (arguing through a comparative analysis that the rise of judicial review—and judicial supremacy—is the product of elitist efforts to insulate policymaking from politics); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L. J. 1346 (2006) (arguing individual rights are not necessarily better protected by justices than by democratic legislators as long as a series of conditions are met); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. Rev. 373, 380 (2007) (making a case for a dialogical institutional approach to judicial review that "examines the many practices that facilitate an ongoing and continuous communication between courts and the public"); Richard H Fallon, *The Core of an Uneasy Case For Judicial Review*, 121 Harv. L. Rev. 1693, 1736 (2008) (arguing that under certain—likely—circumstances judicial review can better serve rights' protection given that the judiciary appears to be better placed "to apprehend serious risks to some kinds of fundamental rights [and] that errors that result in the violation of fundamental rights are typically more morally disturbing than errors that result in the erroneous overenforcement of fundamental rights"); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv. L. Rev. 191, 243 (2008) (using *Heller* to argue originalist interpretations can nonetheless participate of a responsive process of democratic constitutionalism and exposing how "constitutional politics can guide and discipline judicial

the backlash narrative that presumed that *Roe* instantly caused a broad-based conservative counterattack by showing that mobilization against abortion preceded the decision and intensified slowly throughout the decade that followed.[5] Mary Ziegler, on her part, has shown that the rise of *Roe* was not just a passive reaction to the decision, demonstrating it was due in no small part to the choices activists across the political spectrum actively made to make "the abortion battle a central part of their lives."[6] Beyond that, legal historians have said little about the impact the decision had on existing forms of feminist activism.[7] Though feminist scholars have engaged in rich discussions over the limits of rights and, alternatively, over the shortcomings of women's rights as currently understood, they have not done so directly engaging with feminists' projects without *Roe*.[8] Put differently, while there have been numerous accounts

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review."); Pamela S. Karlan, *Democracy and Disdain*, 126 Harv. L. Rev. 1, 66 (2012). (discussing the potential dangers of an institutional mechanism that selects judges through "a highly partisan, consciously ideological process" and where the Supreme Court's skepticism towards other branches of government and its "disdain for democracy" breaks with previous judicial traditions); Ryan D. Doefler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 Vand. L. Rev. 769, 773 (2022) (revisiting the conjectures on which John Hart Ely's defense of judicial review rested –superior institutional capacity to protect minorities and the democratic process– to argue they do not hold and thus democratic confidence is better placed in the legislatures than the courts offering "more democratic approaches to democratic pathologies"). *See also* Michael J. Klarman, *The Degradation of American Democracy — And the Court*, 134 Harv. L. Rev. 1 (2020) (arguing that the conservative majority of the Supreme Court has played a significant role in the degradation of American democracy, particularly on matters of democratic governance).

[5] *See* Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv. C.R.-C.L. Rev. 373 (2007).

[6] Mary Ziegler, After Roe: The Lost History of the Abortion Debate (2015).

[7] With the notable exception of Mary Ziegler and Melissa Murray. Mary Ziegler has referred to feminist activists' changing strategies in courts, but has not focused on their priorities and plans and how they changed throughout the 1960s and 1990s. *See Id.* and Mary Ziegler, *The Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 Law Hist. Rev. 281 (2009). Melissa Murray has documented the history of race, feminism and abortion and how *Roe* affected them. *See also* Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 Harv Rev 2025, esp. 2041-20.

[8] Feminist critiques of rights' contradictions and shortcomings have taken different forms. Critics of the political usefulness of rights have stressed their inability to quarrel with oppressive structural conditions. *See* Dean Spade, *Intersectional Resistance and Law Reform*, 38 Signs J. Women Cult. Soc. 1031 (2013). Wendy Brown, *Suffering the Paradoxes of Rights*, Left Legalism/Left Critique 420 (Wendy Brown & Janet Halley eds., 2002) (a suggestive and compelling exploration of the paradoxes of liberal rights for a critique of the equality and legal rights strategies for their inability to "address the conditions of despair and violence that intersectional resistances seek[] to

of how "the abortion wars" came to be, less attention has been placed on how feminist activists on the ground experienced, claimed, and presented feminist projects and their changing relation to *Roe*.

The paper proceeds in three parts. Part I, *Feminist Freedom*, will present the visions feminists espoused during the 1960s and 1970s, arguing they challenged the structural conditions that relegated women to second-class citizenship.[9] Without shying away from the class and racial tensions activists had to confront, it will present the many ways in which feminists contested what public and private life ought to look like, deploying the law in creative ways to imagine a different world. During that initial phase, feminists' legal imaginary was wide open, as activists deployed

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transform."). Within legal academia, without disavowing rights feminist scholars have posed necessary critiques on the shortcomings of women's rights (as particularly defined in American constitutional doctrine). *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002) (critiquing the prevailing narrow reading of the Nineteenth Amendment) and Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 Wash. Univ. L. Rev. 161 (1979).(favoring the equal protection doctrine as a better rationale for women's rights than privacy). Further, scholars have reflected on what the possibilities of rights could be if imagined differently: for a constitutional intersectional proposal *de lege ferenda*. *See* Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 Yale L. J. (2019). *See also* Gayle Binion, *Human Rights: A Feminist Perspective*, 17 Hum. Rights Q. 509 (1995).

[9] I have opted for an *ad-hoc* periodization instead of the ubiquitous waves metaphor to emphasize the shared richness of legal imaginaries across a varied set of feminist iterations without discounting earlier efforts that do not fit the waves narrative. The wave metaphor suggests that only throughout the waves was feminist activism alive and pungent. But significant feminist activism took place beyond the narrow periods the waves highlight. For instance, as Dorothy Sue Cobble has compellingly shown, labor feminists played an important role during the 1940s and any history of American feminism that occludes it is missing a key aspect of feminists' trajectories. *See* Dorothy Sue Cobble, The Other Women's Movement (2004). For a critical view of the waves metaphor and its implied assumptions of feminist history as one of progressive inclusion to the ranks of white-middle-class activists see: Leela Fernandes, *Unsettling "Third Wave Feminism": Feminist Waves, Intersectionality, and Identity Politics in Retrospect*, *in* No Permanent Waves 98 (Nancy A. Hewitt ed., 2010); Becky Thompson, *Multiracial Feminism: Recasting the Chronology of Second Wave Feminism*, 28 Feminist Stud. 337 (2002); Kathleen A. Laughlin et al., *Is It Time to Jump Ship? Historians Rethink the Waves Metaphor*, 22 Feminist. Formations. 76 (2010). Although the term "second wave" has been reclaimed for more encompassing histories that consider welfare activists as well as liberal and radical feminists, its use continues to appeal to a narrative of feminist progressive inclusion that obscures important aspects of the processes this paper will address and fails to incorporate labor feminists into the story, a crucial precursor of NOW's vision. *See* Kirsten Swinth, Feminism's Forgotten Fight: The Unfinished Struggle for Work and Family (2018).

laws' many tools creatively to articulate and re-articulate social and economic structures.[10] Sections A, B, and C will address the National Organization for Women (NOW), the National Welfare Rights Organization, and the Wages for Housework NY campaign, respectively. Section D will then read those organizational efforts as part of a broader feminist discussion.

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

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

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

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

While several feminist efforts could be considered to understand the scope of feminism before *Roe*, a comprehensive account exceeds this Article's scope (and space). Thus, while I will briefly engage with other groups, my focus will be NOW. The weight of the argument will be carried by NOW for two reasons: first, it was the largest feminist organization; second, it was the most mainstream representative of feminist demands. Because NOW was the most moderate organization, it provides a valuable limit case to demonstrate that even it once had a broader and more encompassing agenda. Feminism's narrowing via the triumph of *Roe feminism* was not just a product of the disappearance of more radical groups but a shift in the horizon of imagination across the political spectrum.

By placing NOW, the National Welfare Rights Organization, and others under the umbrella of *feminist freedom,* I do not intend to collapse the political, racial, and economic differences that divided these groups but to underscore their shared ways of processing and challenging gender

oppression.[11] For all of these groups, redefining social norms, possibilities, and expectations was not just a matter of experimentation but a vital feminist quest for freedom. Whereas the familiar slogan "Sisterhood is Powerful" (associated with the women's liberation movement) has been commonly read to stress how (primarily middle-class) white women's sisterhood squashed out other experiences, it is worth focusing on the generative prospect of the different efforts as powerful sites of sisterhoods in the plural.[12] The transformative potential of these sisterhoods lay precisely in the fact that women were intentionally and massively—across the political spectrum and in different ways—taking matters into their own hands. They seized power by redefining societal expectations and possibilities through their collective action.[13]

I use "freedom" to describe the early period not only because its use was frequent among activists,[14] but also because it denotes the double direction of feminist projects. Freedom entailed

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[11] Most of the groups I mention self-identified as feminists, with the notable exception of the National Welfare Rights Organization that only claimed the label in its last years, due to the racial and class assumptions that underlaid the category. But, as Nadasen has convincingly argued: "[i]n addition to its rightful place within the black freedom movement, the welfare rights movement also represented a struggle by women for their autonomy and, therefore, can and should be defined as part of the women's movement of the 1960s." *See* Premilla Nadasen, Welfare Warriors: The Welfare Rights Movement in the United States, xviii (2005). Kirsten Swinth's general history of the second feminist wave in the United States also incorporated the NWRO among its groups. *See* Swinth, *supra* note 8.

[12] *See* Sisterhood Is Powerful: An Anthology of Writings from the Women's Liberation Movement (Robin Morgan ed., 1970). The phrase has been attributed to Kathie Sarachild who coined it for a 1969 pamphlet but was widely popularized through the anthology volume named after it edited by Robin Morgan. *See also* Barbara J. Love, Feminists Who Changed America, 1963-1975, 405 (2006).

[13] For a synthetic history of feminist efforts throughout this period *see* Swinth, *supra* note 7.

[14] For instance, in May of 1969, Women's Liberation Conference activists reprinted "Women – The Struggle For Freedom": the article listed women's oppression in everyday life including unequal pay, low unionization, education discrimination, home responsibilities, sexual taboos and gendered expectations among others. "But these are only little things. Revolutions are made of little things" and revolution would be brought about by women's pursuit for freedom. "*Only women can define themselves*" as "*the oppressed have to discover their own dignity, their own freedom*, they have to make themselves equal. They have to decolonize themselves. Then they can liberate the colonizers." (emphasis added). The piece was originally published on January 10 of 1969, and reissued for the conference on a series of articles on Female Liberation selected by Boston-area women and published by New England Free Press. Wini Breines Papers, 1969, Unclassified folder (7), 89-M17, Carton 2, Schlesinger Library,

both freedom *from* patriarchal oppression and freedom *to* thrive as individuals *and* social beings.[15] For instance, in her keynote address at NOW's National Conference in 1974, then president, Wilma Scott Heide, stressed that especially for "women and/or men who are homemakers . . . the world is our home though some may choose to believe the home is their world."[16] Scott Heide was not undermining homemakers but pushing for a vision that conceived the home as an integral part of the outer world. In that same address, she criticized societal hypocrisy, ridiculing mainstream objections to public welfare by observing that "[m]ost public welfare goes to already affluent men and/or those so oriented in behaviors and commitments via aid to dependent railroads, subsidies to oil companies, assistance to ailing business men, etc."[17] [sic]. Scott Heide's remarks challenged the value society attributed to housework and care work. A few months later, she urged her audience at the Feminists' State of the Union to "insist that no public body, commission or board have a majority of more than one of either sex and that child care experience be one valuable

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Radcliffe Institute, Harvard University, Cambridge, Mass. Moreover, NOW's first brochure *An Invitation to Join* urged women to join the organization stressing "the time has come to confront, with concrete action, the conditions that now prevent women from enjoying the equality of opportunity and freedom of choice which is their right, as individual Americans, and as human beings." Brochure, National Organization for Women (1966), MC 496, Carton 209, F.3, SLRIHUC. *See* Jennifer Einspahr, *Structural Domination and Structural Freedom: A Feminist Perspective*, 94 Fem. Rev. (2010). The Redstockings was a radical feminist collective that belonged to the "women's liberation movement." *See* Alice Echols, Daring to be Bad: Radical Feminism in America, 1967-1975 (1989).

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

[16] Wilma Scott Heide Papers, Keynote Address of President Wilma Scott Heide to NOW's Seventh National Conference: You Can't Stop NOW!, 3, 1974, Wilma Scott Heide, President, Nat'l Org. of Women, Keynote Address at NOW's Seventh National Conference: You Can't Stop NOW! (May 25, 1974), See MC 495, Box 3, F. 2., Schlesinger Library, Radcliff Institute, Harvard University, Cambridge, Mass (in what follows "SLRIHUC").

[17] *Id.*

criterion for such leadership roles addressed to our future."[18] For Scott Heide, as for millions of women, *feminist freedom* required a new kind of world in which home, work, care, politics, and their relation underwent a radical transformation.

2. Feminist Freedom

Debates about women's issues were incipient in the United States public agenda during the early 1960s, but at that point, widespread feminist activism was still dormant. In June 1963, Congress passed the Equal Pay Act, protecting workers from wage discrimination based on sex. As President John F. Kennedy signed the bill into law, he said the legislation was much needed, as women's labor force participation had drastically increased—1 in 3 workers was now a woman—and continued to rise faster than men's.[19] Furthermore, if the American economy depended "upon women in the labor force," American mothers bore In the president's eyes, the heaviest burden was what would later be known as the second shift, (i.e., women taking on paid work outside the home only to return to undiminished amounts of unpaid domestic work).[20] Though Kennedy's remarks underscored a situation that was not new, especially for women who were poor, Black, or both, an unprecedented number of women found themselves in it.[21] Under

[18] At that point, Wilma Scott Heide had finished her presidency and had been succeeded by Karen DeCrow. Scott Heide remained a prominent NOWer and served as Chair of the National Advisory Board. She delivered her speech as National Vice President of the Women's Coalition for the Third Century, which she had co-founded the previous year. Nat'l Org. of Women, 8th National Now Conference; It's Our Revolution Now (Oct. 24-27, 1975) MC 496, Box 21, F. 3, SLRIHUC; *supra* 15.

[19] "Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force." Remarks Upon Signing the Equal Pay Act. | The American Presidency Project, https://www.presidency.ucsb.edu/documents/remarks-upon-signing-the-equal-pay-act (last visited Jan 30, 2023).

[20] *See generally* Arlie Russell Hochschild & Anne Machung, The second shift: working parents and the revolution at home (1989), https://catalog.lib.uchicago.edu/vufind/Record/974243 (last visited Nov 2, 2022).

[21] *See* Cobble, *supra* note 8, at 11–49.

these circumstances, the President noted, it was critical that "adequate provision be made . . . for the care of the children" while mothers were at work.[22] Accordingly, he continued, the Commission on the Status of Women he had previously appointed would study and report on daycare expansion and tax deductions. The matter could have ended there, with the consideration of a report (or many) by the (disproportionately male) authorities, as it had on numerous other occasions. But something was changing, and in a few years, the uneasiness felt in "the Washington Underground Network" (as Betty Friedan called feminist officials) would resonate among millions of women.[23]

The political environment of the early 1960s played a major role in feminist organizing. The effervescence of the Civil Rights Movement across the nation, and the presence of the New Left on college campuses, were central to the upsurge of feminist activism.[24] Primarily, the Civil Rights Movement and the New Left represented the possibility of thriving social movements, and, for many women, they provided the experience of organizing around a personal cause.[25] In the legislative arena, the 1964 Civil Rights Act secured for Black women many of the protections

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[22] *Supra* note 19.

[23] Betty Friedan was the author of the acclaimed 1963 best-seller The Feminine Mystique and would become NOW's first president. Betty Friedan, Life So Far: A Memoir 164–65 (2000). *See* Betty Friedan, The feminine mystique (1963). The "Washington Underground Network" referred to a group of feminist governmental officials that had been introduced to Friedan by Pauli Murray. Most of them would become NOW founders. As told by Friedan in her memoir, they were "Washington bureaucratic insiders, a small cadre of senior women working for the government. . . . I called this network of women . . . 'my underground,' which made them laugh. They thought I was romanticizing their small network with a revolutionary term like 'underground,' but they liked it." For a revision of Friedan's life *see* Daniel Horowitz, Betty Friedan and the making of The feminine mystique: the American left, the cold war, and modern feminism (1998).

[24] *See* Echols, 3-50 *supra* note 12.

[25] *See* Echols, 26 *supra* note 12. In the same vein, *see* Sara Evans, Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement & the New Left (19); Wini Breines, *A Review Essay: Sara Evans's "Personal Politics,"* 5 Fem. Stud. 495 (1979).

white women enjoyed. Further, the Act's section on Equal Employment Opportunity, Title VII, incorporated sex among the prohibited grounds for discrimination (along with race, color, religion, and national origin), thus expanding the areas of employment discrimination against which women were protected.[26]

Important as they were, however, these legislative efforts continued to fall below the yardstick of expectations of the activists who had collaborated with the government. It was one thing to incorporate women in the process and quite another for the outcome to be responsive to their proposals. At the Third Annual Conference of State Commissions on the Status of Women of 1966, four years after the Commission's inaugural appointment, the time had come for a "NAACP for women."[27] Those who had become increasingly disenchanted with the government's limited commitment to the women's cause decided to form a new organization, the National Organization for Women (NOW).[28]

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[26] *See* Katherine Turk, Equality on Trial (2016); Nancy MacLean, Freedom Is Not Enough: The Opening of the American Workplace (2008).

[27] *See* Betty Friedan, Life So Far: A Memoir (2000).

[28] Not without pushback, the group of assistants that had gathered in Friedan's room on the second night of the conference (at the invitation of Betty Friedan and Pauli Murray) finally decided to join the crusade after the proposal they had drafted as an alternative to forming a new organization—that is, as a way to keep fighting from within—was rejected on the conferences' luncheon. Rosalind Rosenberg, Jane Crow: the life of Pauli Murray 286–309 (2017). Pauli Murray had been reticent to the idea of forming a new organization because she did not want to compete with the existing ones. However, after her constitutional strategy "had stalled in Alabama, and no other test case emerged," and the Equal Employment Opportunity Commission rejected the council's suggestion to outlaw gender-segregated columns for "Help Wanted" ads in the newspapers, Murray had decided the time had come for a new organization. *Id.* at 297. The idea of a women's organization focused on women's rights advocacy had been rounding many of the conference's assistants for a while. Rosalind Rosenberg, Jane Crow: the life of Pauli Murray 286–309 (2017). The women who were government staff, baptized by Friedan as the "Washington Underground Network," had been gathering and distributing information to women's organizations around the country but were hesitant about forming a group that would directly pressure the government given their institutional position. *Id.* Catherine East, the central figure among the government staff women, had convinced Friedan "that she was the best person to organize an independent's women's group." *Id.* at 298. For an account of NOW's formation *see* Katherine Turk, The women of NOW: How feminists built an organization that transformed America, chapter 1, (2023).

National Organization for Women

NOW vowed "[t]o take action to bring women into full participation in the mainstream of American society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men."[29] However, bringing women to the mainstream was not just a matter of including them. It required a profound rethinking of societal structures for full participation and equal partnership to be substantial. The group pledged "aid for all women, factory workers as well as executives, 'to break through the silken curtain of prejudice and discrimination against women in government, industry, the professions, the churches, the political parties, the judiciary, the labor unions, in education, science, medicine, law, religion and every other field of importance in American society.'"[30]

The world envisioned by NOW focused on traditionally public spaces—areas imagined as primarily male—but also aspired to "an equitable sharing of the responsibilities of home and children and the economic burdens of their support."[31] Though rhetorically NOW was committed to a far-reaching redistribution of social roles everywhere, given the founders' backgrounds refiguring the public arena as a space amenable to both women and men appeared as the main

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

[30] This is from NOW's First Press Release, written after the October 29, 1966 meeting where Betty Friedan was elected President and Cathryn Klarenbach was elected chair of the Board of the new founded organization. See Press Release, An Invitation to Join (1966), MC 496, Carton 200, F.2, SLRIHUC.

[31] Press Release, NOW (Nov. 21, 1966) MC 496, Carton 200, F. 2, SLRIHUC.

priority.[32] Their aim was not merely to "include" women in those spaces but to re-invent them in a way that transcended gendered divisions of work. That was the logic undergirding Scott Heide's recommendation that child care experience be considered a valuable qualification for public office.[33] More often than not, however, concerns over economic deprivation (within the paid labor market) featured at the center of NOW's early agenda.[34]

A year after its formation, NOW drafted a Bill of Rights for women at its National Conference, which was finally issued in 1968. Among the bill's octet of rights, only one, the last one, referred to what has appeared as the leading issue since the 1990s: the right to control one's reproductive life.[35] The first right consisted of incorporating the Equal Rights Amendment (ERA) into the Constitution.[36] Indeed, the ERA passage became an organizational priority during its first decade. The second was to promote enforcement of laws banning sex discrimination in employment, which was also high on NOWers' list of priorities.[37] Many of the founders were

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[32] In that sense NOW was definitely in part the heir of labor feminists' legacy both because of its ideological commitments and because many of its founders had participated in what Dorothy Sue Cobble has referred to as "the other women's movement." Among these were Addie Wyatt, Caroline Davis, Lillian Hatcher and Dorothy Haener. *See* Sue Cobble, *supra* note 7.

[33] *See* Heide, *supra* note 17.

[34] To be sure, these efforts nominally included homemakers' concerns and economic deprivation, even among middle- and upper-class women who did not have direct access or influence over the familial budget. *See* Press Release, NOW, MC 496, Carton 200, F.1, SLRIHUC; Press Release, NOW (Jan. 6, 1967) MC 496, Carton 200, F.3), SLRIHUC; Press Release, NOW (Feb. 15, 1968), MC 496, Carton 200, F.4, SLRIHUC.

[35] *See* Bill of Rights, NOW, (1967), MC 496, Box 1, F.2, SLRIHUC. According to the organization's current recount of its history, it was the first national organization to endorse the legalization of abortion with its inclusion in their Bill of Rights. *See* NOW, *Highlights*, https://now.org/about/history/highlights/ (last visited Feb 2, 2023).

[36] This was several years before Representative Martha Griffiths reintroduced the amendment in 1970 to finally be passed by the House and Senate in 1971. For a history of how feminist factions – previously at odds– coalesced around the 1970s ERA dual strategy see Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 Calif. L. Rev. 755 (2004).

[37] "NOW BILL OF RIGHTS: I. Equal Rights Constitutional Amendment/ II. Enforce Law Banning Sex Discrimination in Employment/ III. Maternity Leave Rights in Employment and in Social Security Benefits/ IV. Tax Deduction for Home and Child Care Expenses for Working Parents/ V. Child Day Care Centers/ VI. Equal and

particularly invested in employment regulation. After all, most had come from that world.[38] The five rights that followed related to social problems around child care and other material needs. These included maternity leave and social security benefits, tax deductions for child care expenses, daycare centers, and "Equal and Unsegregated Education."[39] The seventh called for "Equal Job Training Opportunities and Allowances for Women in Poverty."[40]

Unsegregated Education/ VII. Equal Job Training Opportunities and Allowances for Women in Poverty/ VIII. The Right of Women to Control their Reproductive Lives/ We Demand: I. That the United States Congress immediately pass the Equal Rights Amendment to the Constitution to provide that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" and that such then be immediately ratified by the several States. II. That equal employment opportunity be guaranteed to all women, as well as men by insisting that the Equal Employment Opportunity Commission enforce the prohibitions against sex discrimination in employment under Title VII of the Civil Rights Act of 1964 with the same vigor as it enforces the prohibitions against racial discrimination. III. That women be protected by law to insure their rights to return to their jobs within a reasonable time after childbirth without loss of seniority or other accrued benefits and be paid maternity leave as a form of social security and/or employee benefit. IV. Immediate revision of tax laws to permit the deduction of home and child care expenses for working parents./ V. That child care facilities be established by law on the same basis as parks, libraries and public schools adequate to the needs of children, from the pre-school years through adolescence, as a community resource to be used by all citizens from all income levels. VI. That the right of women to be educated to their full potential equally with men be secured by Federal and State legislation, eliminating all discrimination and segregation by sex, written and unwritten, at all levels of education including college, graduate and professional schools, loans and fellowships and Federal and State training programs, such as the job Corps. VII. The right of women in poverty to secure job training, housing and family allowances on equal terms with men, but without prejudice to a parent's right to remain at home to care for his or her children; revision of welfare legislation and poverty programs which deny women dignity, privacy and self-respect. VIII. The right of women to control their own reproductive lives by removing from penal codes the laws limiting access to contraceptive information and devices and laws governing abortion." Press Release, NOW Bill of Rights, (1967) MC 496, Box 1, F.2, SLRIHUC. *See* Katherine Turk, The women of NOW: How feminists built an organization that transformed America, 79-81, (2023).

[38] Betty Freidan was elected President and Dr. Kathryn Clarenbach, Director of Continuing Education at the University of Wisconsin and Chairman of the Wisconsin's Governor Commission on the Status of Women, chairman of the board. Aileen Hernandez, who had formerly been a Senior Commissioner of the Equal Employment Opportunity was named executive Vice-President and, Richard Graham, who had worked alongside Hernandez as a Commissioner and had been the founding director of the National Teachers Corp Vice-President. Caroline Davis, who had served at the presidential commission on the status of women was the Director of the Women's Department of the United Auto Workers, AFL-CIO was named Secretary-Treasurer. Letter to Muriel Fox & Betty Friedan, "For Immediate Release," NOW Records, (1966), MC 496, Carton 200, F.2, SLRIHUC.

[39] *See supra* note 38.

[40] NOW Records, *supra* note 38.

While some measures like tax deductions were aimed at (white) middle-class professionals, others incorporated preoccupations directed at working-class women, namely, allowances for women in poverty and job training "without prejudice to a parent's right to remain at home to care for his or her children."[41] This meant both to provide women with opportunities in the waged-labor market while still recognizing that it was not the only, nor necessarily the best, option.[42] The disclaimer about a parent's (as opposed to a mother's) right to stay at home with their kids reflected a genuine, even if partial, commitment to the deconstruction of gendered care roles, which manifested in the organization's many initiatives.[43] NOW would not need to wait long for their contention to resonate into the legal mainstream. In the famous *Weinberger vs. Wiesenfeld*, the

[41] NOW Records, *supra* note 38.

[42] For example, the Sixth Annual Conference (1973) of the NOW Souvenir Journal promoted the Quarterly Newsletter "Working Mothers" whose heading read: "All Mothers Are Working Mothers" inextricably linking women's work outside and inside the home. NOW Records, Sixth Annual Conference Booklet (1973) (MC 496, Box 21, F.1, SLRIHUC.

[43] For instance, NOW's task force on the Masculine Mystique strove to denaturalize gender roles by fostering a nurturing fatherhood and challenging successful-male-breadwinner ideals, See Kirsten Swinth, Feminism's Forgotten Fight: The Unfinished Struggle for Work and Family, 42-69, (2018). Although by 1967 cultural assumptions about gender roles were being questioned, the challenges concentrated mostly on society's limited vision of women's possibilities. That is, through an expansion in the perception of women's desert for more professional, sexual and political opportunities. In the media for example, the ideal of women as being's incapable of sexual pleasure outside of marriage, or who's sexuality was set for expiration on her early thirties was deeply defied by the film version of the 1963 novel "The Graduate" which debuted as a motion picture in 1967. The instant-classic was awarded five golden globes and one Academy Award, in addition to the positive reception it had from critics along with its tremendous economic success, the third highest gross amount of its time. Ironically though, the actress who portrayed middle-aged Mrs. Robinson in the film was 35 years old when she was filming, while her co-protagonist who was supposed to be a 21-year-old was impersonated by an actor who was 29 at the time. Alec Scott, *When "The Graduate" Opened 50 Years Ago, It Changed Hollywood (and America) Forever | Arts & Culture| Smithsonian Magazine*, Smithsonian Magazine (2017), https://www.smithsonianmag.com/arts-culture/graduate-opened-50-years-ago-changed-hollywood-forever-180967222/, (last visited Feb 8, 2023). In fact, a decade later the issue would become momentous as NOW strived to incorporate the Equal Rights Amendment to the Constitution and intended not to alienate housewives who felt their lifestyle was being threatened by the ERA. *See* Ziegler, Chapter 4, *supra* note 5.

Supreme Court held it unconstitutional for a social security survivorship benefit to care for children to apply to widows but not widowers.[44]

Economic concerns were at the center of NOW's agenda during its early years. To the organization's eyes, the "working woman" appeared as a leading bank consultant, an "unskilled" laborer, and a woman in poverty.[45] She materialized as a figure that broke into traditionally male spaces on the one hand and as a champion for the betterment of conditions in historically female occupations on the other.[46] The organization campaigned to bring women to all areas of power while recognizing the social significance of traditionally female roles, particularly care labor—

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

[45] For example, Aleta Styers, a National NOW Board Member who had been president of NOW's Chicago chapter led a discussion on women in business on March 19, 1970 at the Cloud Room of Michigan Avenue's Allerton Hotel. Participants were served cocktails at 11:30 then participated in the discussion led by Styers at the luncheon at noon. *See* See Aleta Styer Papers, Sex Stereotypes in Business, 1970, MS66, F. 5, Charles Deering McCormick Library of Special Collections, Evanston, Illinois. (In what follows the Charles Deering McCormick Library Archive will be referred to as CDMLSCE).

[46] For example, Nurses NOW was one of the earliest and most active task forces. Wilma Scott Heide, who had come from the profession, served as NOW's president between 1971 and 1974. *See* Letter from Eastern Mass. Chapter of NOW to Muriel Fox, et al. (Jan. 24, 1973), in Questionnaire for task force coordinators, MC 496, Carton 42, F.10, SLRIHUC.

both underpaid and unpaid.[47] In the same vein, NOWers explicitly adopted women's poverty as a concern and took action. For instance, they collaborated in 1968 with the poor people's campaign, writing checks and fasting to support the cause.[48] Although leaders and NOW's publications sometimes referred to welfare recipients and homemakers, their actions and policies mainly focused on the waged working woman. Lobbying, litigation, and community outreach efforts were primarily devoted to employment issues.[49]

However, for NOW, not all that glittered was employment. Care arrangements, too, were up for grabs, and NOW seized the invitation with enthusiasm. The organization did not merely conceive of child care—like Kennedy had—as a response to women's material need under current conditions. Instead, NOW articulated the demand as a public matter, casting it through a particular remedy: a large-scale public service. The question was not only about women's material needs or entitlements, which could be addressed in different ways, but also about social meanings. The Bill of Rights proposed that "child care facilities be established by law on the same basis as parks, libraries and public schools adequate to the needs of children, from the pre-school years through adolescence, as a community resource to be used by all citizens from all income levels."[50] NOWers conceived of child care both as the response to a material need *and* as a civic aspiration, an

[47] Nat'l Org. of Women, *supra* note 39.
[48] Press Release, Nat'l Org. of Women, Women's Rights Group Urges May 18th Fast Supporting Poor People (NOW Records, MC 496, Carton 200, F. 4).
[49] See Aileen Hernandez Papers, SSC-MS-00730, Boxes 81, 83, Smith College Special Collections, Northampton, Massachusetts. (In what follows the Smith College Special Collection Archive will be abbreviated as SCSCN).
[50] *See* NOW Records, *supra* note 32.

imagined public space positioned precisely alongside the most paradigmatic public spaces.[51] That is, NOW's investment in child care was as much an investment in public goods, public spaces, and citizenship. High-quality child care ought to be nationally available as "all socio-economic groups are fully and equally entitled to this service."[52] Even beyond the Bill of Rights, the organization considered daycare a crucial issue. NOW's Child Care agenda on the ground combined grand policy projects with small-scale local initiatives. For NOW, it was paramount to empower chapters to take matters into their own hands and foster community bonds in responding to local daycare needs.[53] At stake was not just the provision of child care, but the kind of service that would be offered. NOW's aspired transformation was to be cast through new institutions and practices articulated through the law in the form of public services and cooperative institutions.

During its early years, NOW often referred to itself as a women's civil rights organization.[54] For many of its leaders, the women's movement—and NOW, which ought to be its rightful head—was the natural successor to the Black civil rights movement. Tellingly, a 1969

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[51] Following Arendt, I use public in this context as the "public realm, as the common world, gathers us together and yet prevents our falling over each other…" A place of physical encounter as well as one of common construction, a shared world. *See* Hannah Arendt, Danielle Allen & Margaret Canovan, The Human condition 52-53, (2018).

[52] Memo to all chapters of Nat'l Org. of Women, Florence F. Dickler. Aleta Styers Papers, MS66, Box. 1, F. 8, CDMLSCE. The NOW's commitment to Child Care was expressed in the establishment of a National Child Care Coordinator within the organization. Efforts to actually push forward Day Care initiatives, though, proved more difficult than what NOW's leadership had initially expected. Even within the organization, enthusiasm was spotty, presumably due to the lack of members with small children. More generally, childcare was an important concern for the movement. *See* Swinth, *supra* note 7.

[53] In addition to advocating for national efforts, the organization encouraged its local chapters to form their own child care committees. Local committees were expected to be familiarized with child care legislation, build bridges with other activists, public figures, trade unions and industries, press for greater tax benefits, publicly advocate for the expansion of better, more widely available daycare services, as well as studying how to form a child care facility and what were their community's daycare needs. Memo to all chapters of NOW, Florence F. Dickler, Aleta Styers Papers, F. 8.; Speech on Day Care by NOW's National Day Care Coordinator, F.1., SLRIHUC.

[54] *See* e.g., Statement of National Organization for Women – July 9, 1973, SSC-MS-00730, Box 81, SCSCN. *See also*, a Nat'l. Org. of Women brochure "…a new civil rights organization pledged to work actively to bring women into full participation in the mainstream of American society NOW." MC 496, Box 209, F.3, SLRIHUC.

NOW newsletter for members recounted the launch of its campaign against sex-segregated spaces by insinuating it was the continuation of the Black fight for freedom.[55] The publication unironically noted, "[i]t was the birthday of Abraham Lincoln, the Great Emancipator, the day NOW was to launch its nationwide Public Accommodations week to protest sex discrimination in restaurants, bars and public carriers" as it featured a picture of four women in fur winter coats picketing the Oak Room of the Plaza Hotel.[56]

Symbolically, positioning their fight alongside emancipation and civil rights made sense for NOW's larger vision of a feminist quest for freedom. Strategically, as racial segregation of social spaces had become unacceptable, the link could harness sympathy for the action.[57] Besides, many conflicts that preceded the rise of the anti-segregation civil rights doctrine loomed in feminist discussions.[58] The centrality of economic concerns, and their relation to the broader redefinition of the social sphere, was a site of intense debate within feminist circles. NOWers decided to launch their campaign at the emblematic Plaza, signaling that women were ready to enter all spaces where decisions were made while hinting that the class inequalities they underscored would remain

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[55] The 1969 National Conference had voted to "stage demonstrations against 'Men Only' restaurants, bars, clubs, and other sex-segregated public accommodations" in a "Public Accommodations Week" of protests (Press Release, October 12 1969, MC 496, Carton 200, F.5, SLRIHUC.

[56] The picture's footer read: "Plaza's Oak Room bars women, and that's what the picketing is all about." In the image, five protesters could be distinguished, four women in coats and one man in suit. The article explained protesters were instructed to "wear a fur coat" so as to avoid potential dress code objections on the part of the Plaza. It celebrated the press' lively concurrence to the action notwithstanding the bad weather that "the 30 NOW demonstrators, including two brave male members—Dr. Shepard G. Aronson and Stephen Stalonus—were outnumbered almost two-to-one by reporters, photographers and camera crews." Nat'l. Org. of Women Acts, Winter/Spring, vol. 2, no.1, 1969 at 7, Dolores Alexander Papers, MC 499, Box 3, F.1, SLRIHUC.

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

[58] For an account of how economically imbued visions of civil rights were displaced by the ultimate victor, anti-segregation doctrine and the underlying stakes of the discussion, see Risa L. Goluboff, The Lost Promise of Civil Rights (2010).

unchanged. Instead of defying the elitist logic of the Plaza, NOWers opted for an assimilation strategy by picketing in elegant coats (protesters "had been instructed to wear a fur coat, even if they had to borrow one").[59] Of course, no one action expressed the terms of the revolution NOW envisioned, but the emphases they made along the way reflected the contested contours of their vision. The fur coat picketing did receive pushback from some members. As one "somewhat bitterly" remarked: "This 'frivolous' issue gave NOW more publicity than most of the serious issues we're fighting for."[60] In any case, if mediated by class, NOWers strove to open spaces for women in every area they could think of. Though differentially articulated, civil rights and citizenship notions were essential for their plan.

In those years, more and more women began to organize from coast to coast around issues of their everyday lives. The capacious pursuit of *feminist freedom* manifested in numerous sites; homes, parks, families, bookstores, welfare offices, streets, legislatures, courts, doctor's offices, and daycares, to name a few.[61] Because everyday life was so different for women depending on their age, class, race, ethnicity, and geographical context, organizing around quotidian issues took

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[59] *See* Dolores Alexander Papers, *supra* note 58.
[60] Dolores Alexander Papers, *supra* note 58.
[61] Many of these groups have been studied separately, for an overview of radical feminists (who characteristically met in living rooms, bookstores, streets and even *communes*) see Echols, *supra* note 12.. For an overview of the feminist landscape and spaces specially dedicated to feminist activism (art galleries, health clinics, domestic violence shelters, etc.) see Daphne Spain, Constructive Feminism (2016), https://www.cornellpress.cornell.edu/book/9781501703201/constructive-feminism/ (last visited Jan 30, 2023). For a history of the welfare movement and their uses of the streets, courts and welfare offices see generally Felicia Kornbluh, The Battle for Welfare Rights: Politics and Poverty in Modern America (Illustrated edition ed. 2007); Nadasen, *supra* note 9; Annelise Orleck, Storming Caesars Palace: How Black Mothers Fought Their Own War on Poverty (Annotated edition ed. 2006). For a specific account of healthcare centers and spaces see generally Hannah Dudley-Shotwell, Revolutionizing women's Healthcare: the feminist self-help movement in America (2020), http://pi.lib.uchicago.edu/1001/cat/bib/12542821 (last visited Sep 20, 2021); Sandra. Morgen, Into our own hands: the women's health movement in the United States, 1969-1990 (2002).

diverse forms as well: whether through collectives, local cooperatives, informal mutual-aid associations, college campus groups, or elegant fundraising dinners, women all over were taking matters into their own hands.

As the feminist cause sprawled, NOW appeared as the natural candidate to lead the fight. Or at least it seemed so to then-president Betty Friedan. In 1969, Friedan "jubilantly" informed all members that under the favorable "new nationwide consciousness of the oppression of women," NOW canceled its regular September board meeting to organize regional conferences instead. Friedan explained that the purpose was "to try and form a political power bloc of all women bourgeoning women's liberation groups and feminist caucuses in all fields of American life."[62] Activists would coalesce into a unified power bloc through which NOW could spearhead the fight.

As the nascent organization strived to become the authoritative representative of women's demands (to the outside), some of its leaders pressed for a more representative composition on the inside. Many within NOW were mindful of how race and class inflected different manifestations of the feminist struggle. A few months before Friedan's enthusiastic letter to the membership, board member Aileen C. Hernandez—who would succeed Friedan in the presidency—had urged the board to increase their efforts to "[get] members from minority groups and from trade union women" noting that "[w]ith the exception of our strong UAW members, I don't think we have gained wide support in non-professional circles."[63] Unlike Friedan, Hernandez had been part of

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[62] Memorandum from Betty Friedan, President of the National Organization for Women, to all members of NOW (1969) MC 499, Box 3, F.3, SLRIHUC.

[63] Letter from Aileen C Hernandez to NOW National Board, December 1st 1968. See Aileen C. Hernandez Papers, Suggestions to the National Board of NOW, 1968, SSC-MS-00730, Box 74, SCSCN. She had also expressed similar

the "Underground Network." She was an African American union organizer, a civil rights activist, and had been an EEOC commissioner until her resignation in 1966 in protest of the Commission's non-enforcement of Title VII.[64] The contrasting visions and trajectories of NOW's first presidents reflected a tension that troubled the organization through the following decades.

Feminists' wide-ranging efforts were mutually imbricated in the struggle for freedom. Although work areas were important on their own, collectively, they represented the possibility of a new order. Potential members were introduced to the organization through its work, which was meant to tackle the oppressive structures women were subjected to in virtually every aspect of life: economic, educational, social, political, cultural, and religious. For instance, in 1967 and 1968, NOW's invitation to new members publicized its seven task forces (Equal Employment Opportunity, Women in Poverty, Sex Discrimination in Education, Marriage and the Family, The Image of Women, Women in Religion, and Political Rights and Responsibilities).[65] Note how

concerns ("I still think NOW needs to find ways of gaining more appeal in the minority communities") in 1967 in a private letter she sent to Muriel Fox on October 21. See Betty Friedan Papers, letter from Aileen C. Hernandez to Muriel Fox, 1967, MC 575, Box 122, Folder 1484, SLRIHUC.

[64] Hernandez had been born in Brooklyn to Jamaican parents. Aileen Clark spent her first years in New York, where she would come of age. She spent her childhood first in Harlem and then Brooklyn, until she moved to Howard University for College before becoming an organizer. *See* Katherine Turk, The women of NOW: How feminists built an organization that transformed America, (2023), esp. 6, 13, 37, 41.

[65] Brochure, National Organization for Women, An Invitation to Join 1967 MC 496, Box 1, F.2, SLRIHUC; Brochure, National Organization for Women, An Invitation to Join 1968 MC 496, Box 1, F.2, SLRIHUC. Earlier drafts from November 1966 tentatively suggested: "Employment, Education, Social Invitations, Image of Women, Political Rights and Responsibilities, Poverty." Agenda NOW Board Meeting (Nov. 20, 1966) MC 575, Box 126, F.1544, SLRIHUC.

there was no independent task force for reproductive rights at that point. The first would not appear until 1970.[66]

However, creating a task force on reproduction did not mean it became central. In contrast, in 1970 NOW's priorities were political power, the ERA, and mounting "a national campaign for universal child care."[67] The emphasis at that point was on social and economic structural inequalities that prevented women's full participation in American society. Abortion was but a part of this larger canvas. Tellingly, a pamphlet of the 1970 massive Women's Strike for Equality NOW organized demanded: "the right to free abortion on demand, no forced sterilization, free 24 hour [sic] childcare centers—community controlled, and equal opportunities in jobs and education."[68] When abortion appeared it was part of a larger attack on the structural conditions that curtailed women's freedom.

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[66] *See* Dolores Alexander, *Abortion Repeal: N.O.W. Makes it Respectable!*, 2 NOW acts 1, 15 (Winter/Spring 1969) (reporting on all the organization's actions on abortion Alexander notes that "[v]arious NOW chapters have been working consistently to promote abortion repeal in their states.") MC 499, Box 3, F. 1, SLRIHUC; *see also* Memoranda from Nat'l Org. of Women (1970–1980) (comparing a collection of Nat'l Comm. Coordinators directory lists from a span of years in which the reproduction-related committee appears and its naming convention evolves) MC 496, Carton 42, F. 13, SLRIHUC.

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

[68] *See* Judy Klemesrud, *Coming Wednesday A Herstory-Making Event*, N.Y. Times (Aug. 23, 1970) (illustrating that the demand against forced sterilization was added to the pamphlet later because this newspaper article did not include forced sterilization, suggesting the added preoccupation came from rank-and-file activists more attuned to the needs of women of color) https://www.nytimes.com/1970/08/23/archives/coming-wednesday-a-herstorymaking-event-demonstrations-and-parades.html [https://perma.cc/43LU-DESA]; *see also* Pamphlet, Nat'l Org. of Women, Women's Strike Demonstration (1970) MC 499, Box 10, Folder 17, SLRIHUC; Turk, *supra* note 66, at 104–108 (illustrating the story behind the organization of the 1970 demonstration); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L. J. 1988–93, (2003) (depicting the stakes of the strike).The demand against forced sterilization was probably added after the initial design of the pamphlet was ready. The demand was included next to abortion, in a different Font from the one used on the rest of the pamphlet. The official account of the strike's demands, as

As President Hernandez wrote the following year, "[i]f the American woman wants to change her environment, the time is now and the voice must be her voice, defining her own issues and solutions. The goal of the new feminists is a restructuring of the society—to provide shared power and a shared responsibility."[69] Indeed, by seizing power to define their issues and solutions, NOW confronted the social and economic structures that oppressed women. Even if the organization did not live up to its promises, as Hernandez feared, NOW was committed to confronting women's oppression across the economic and racial spectrum from its early years. It did so by setting its eye on numerous structures.

NOW considered itself the leader of the revolution whose time had come and fought to live up to the task. But if revolutionary, their fight was not new. Activists saw themselves as part of a longer genealogy. In their self-conception, the organization's founding was the resurrection of suffragettes' unfinished fight for freedom. NOW's existence constituted a point of inflection in the long feminist struggle. Their history recounted: "The National Organization for Women was a reality; the new feminists were on the march—determined to finish the fight for freedom which

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reported by the NYTimes did not include forced sterilization, suggesting the added preoccupation came from rank-and-file activists more attuned to the needs of women of colour. Other newspapers reported the "[m]ajor goals of the demonstration were equal job opportunity and pay, free abortions and 24-hours childcare centers" ommitting the community controlled aspect. For the NYT see Judy Klemesrud, *Coming Wednesday*, The New York Times, Aug. 23, 1970, https://www.nytimes.com/1970/08/23/archives/coming-wednesday-a-herstorymaking-event-demonstrations-and-parades.html (last visited Jun 21, 2023); for a representative account of other newspaper coverage (cited above), see Associated Press, *The Daily Tribune*, Newspapers.com, Aug. 27, 1970, at 12. For the flyer see Dolores Alexander Papers, Women's strike demonstration pamphlet, 1970, MC 499, Box 10, Folder 17, SLRIHUC. For the story behind the organizion of the 1970 demonstration see Katherine Turk, *supra*, note 66, 104-108. For a synthetic and powerful depiction of the stakes of the strike, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale Law J. 1988-1993, (2003).

[69] The Preening of America, STAR-NEWS, Pasadena, California, New Year's Edition 1971, by Aileen C. Hernandez, President of the National Organization for Women, at Aileen Hernandez Papers, SSC-MS-00730, Box 86, SCSCN.

had ground to a halt with the passage of the Suffrage Amendment in 1920."[70] Interestingly, in their recollection, the ratification of the Nineteenth Amendment marked both a moment of triumph and defeat.[71] However momentous, the amendment had marked the cessation (even if temporary) of the fight for freedom.

National Welfare Rights Organization

As NOW founders pledged to form an organization on June 30, 1966, the streets of Washington and other cities witnessed a different group's more visible launch. Six thousand activists (primarily women) grappling with questions essentially not that different from the ones NOW founders were confronting demonstrated across the country.[72] That day, welfare recipients protested at state capitols, roads, public squares, and welfare offices, greeting onlookers with the first national demonstration of Aid to Families with Dependent Children recipients.[73] These actions were part of a coordinated effort to launch a nationwide welfare rights campaign that would later be known as the National Welfare Rights Organization (NWRO). Although local groups had

[70] Nat'l Org. of Women, The First Five Years 1966–1971 (1971) (recounting the organization's origin and evolution in its first five years), MC 496, Box 1, Folder 1, SLRIHUC.

[71] This genealogy loomed large on NOW's imaginary; the Women's Strike for Equality of 1970 commemorated 50 years from the passage of the nineteenth amendment. See Hernandez, *supra* note 68.

[72] *See* They demonstrated on June 30 of 1966 in 25 cities, including New York, Ohio, Los Angeles, Baltimore, Trenton, Louisville, Boston, Washington and San Francisco. Post et al., *supra* note 70, at 1943 (2003)Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale Law J. 1943 (2003).; *see also* For a history of the United States welfare rights rise during the twentieth century, and its embedment in power and significance for American governance see Karen Tani, States of Dependency Welfare, Rights, and American Governance, 1935–1972 (2016).

[73] For example, Boston protesters, one newspaper reported, "made their point by storming the state house to force state officials to listen to complaints about the welfare system." 24 Women in Welfare March in Boston Force Volpe, Brooke to Hear Complaints, North Adams Transcript, Jul. 1, 1966, at 39. *See also* Reed Smith, *Welfare March, Rallies Point Up Dissatisfaction*, Steubenville Herald Star, Jun. 30, 1966, at 17; Welfare March Culminated, Garden City Telegram, Jun. 30, 1966, at 9.

been agitating and organizing around welfare for some time, the inaugural demonstration signaled the beginning of the national campaign "involving more than one hundred local [welfare rights] groups."[74]

While the welfare rights movement was not explicitly feminist from its origin, most of its constituency consisted of African American women.[75] Female welfare recipients, such as New York's Beulah Sanders and Jennette Washington, held significant leadership positions.[76] Materially a women's movement devoted to poor—overwhelmingly Black—women's issues, the welfare rights campaigns defied the expectations and control society exerted over Black women.[77]

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[74] Kornbluh, *supra*, 16, note 64.

[75] While roughly half of the welfare rolls in the mid-1960s were lined by African Americans (48 percent), the welfare rights movement was primarily integrated by African Americans, "perhaps 85 percent, with some participation by white, Latina, and Native American women." Nadasen, *supra*, note 9. The welfare rights movement thus "represented a struggle by women for their autonomy and, therefore, can and should be defined as part of the women's movement of the 1960s." *Id.* at xvii.

[76] Washington attended the convention where the national coordination was officially launched and was a member of the executive board of the New York Citywide Coordinating Committee roughly from 1968 to 1971. She then participated on the national leadership until 1973, when she was removed from her position by Faith Evans who accused her and other members of falling into factionalism. Washington then presented her resignation from the NWRO and announced she would direct her energies to the National Unemployed and Welfare Rights Organization instead. Sanders on the other hand was the national chair of the NWRO from 1970 to 1974. She was also the organization's first vice-president. She left her position as chair when delegates voted to replace her with Frankie Jeter as a way to distance the movement from its intense lobbying activity in favor of other strategies. Washington moved to New York as a child with her mother who had left Florida to find a job. Washington worked in a factory until she was laid off during a recession, she then turned to welfare to help support her three children. Nadasen, supra note 12, at 214. Sanders had moved to New York from her hometown Durham, NC, along with her twin boys to find a job a decade earlier. By 1966, unable to secure employment she lived with a small welfare check in a neighborhood subject to the urban renewal program (known as the "Negro removal" program by some black activists) where her activism began. The program was intended to "renew" urban spaces by eradicating "slum" housing, removing poor people from the neighborhoods they lived in "to make way for better housing and wealthier families." Sanders advocated for poor people's rights to remain in their homes, pushing to reform the urban renewal program and end the demolition of their homes. Many of the neighbors that were subject to the urban renewal program were also welfare recipients. She had a vast experience as an organizer having participated "for many years in urban renewal, housing rights, parent-teacher associations and a community group." *Id.* at 24–25; Kornbluh, *supra* note 63, at 14–180.

[77] An important fight was that against the "man of the house laws" by which administrative authorities denied welfare recipients of their benefits if they were found to have sexual or affective relations with a man who was then

Agitating around welfare was a way to demand social recognition of Black women's work as mothers. In fact, several local welfare organizations included the word "mother" in their name and "portrayed themselves as [mothers'] groups."[78] As an abstract model, the (white) stay-at-home mother (with a breadwinner husband) was not just an economic ideal but a moral imperative that welfare feminists countered with a competing vision. The NWRO deployed laws and welfare policies to rearrange the social picture in which Black welfare mothers featured.[79]

In struggling for the expansion of welfare benefits, activists strove to gain economic and social freedom. The first step in that road was securing the benefits they were legally entitled to but had been denied due to administrative loopholes. A representative example was the minimum standards campaign.[80] The operation came about when the NWRO gained access to the welfare department's lists of goods available for recipients, information that until that moment had been carefully and deliberately kept from them.[81] With the help of some dissident caseworkers, welfare activists had access to comprehensive data about "the array of goods the welfare department—in manuals it did not share with recipients—claimed were necessary for families to live at a minimum standard of health and decency."[82] Thus, by circulating what the minimum standards lists comprised and coordinating recipients to demand them, the NWRO got hundreds of dollars' worth

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deemed the rightful provider. *See* Alison Lefkovitz, *Men in the House: Race, Welfare, and the Regulation of Men's Sexuality in the United States, 1961–1972*, 20 J. Hist. Sex. 594 (2011).

[78] Premilla Nadasen, Welfare Warriors: The Welfare Rights Movement in the United States, 31 (2005).*supra* note 12, at 31.

[79] *See* Kornbluh, *supra* note 64; Nadasen, *supra* note 12.

[80] Kornbluh, supra note 63 at 44-48

[81] Kornbluh.

[82] Kornbluh, 45, *supra* note 64.

of winter clothing and numerous new members for the organization.[83] The provision of what children needed under the minimum standard of well-being set by the administration was, thus, enabled by the militant efforts of mothers claiming their autonomy and worth as heads of households. NWRO's creative deployment of administrative standards turned recipients' relationship with the state upside down, from nuisances in the eyes of the state bureaucracy to citizens in their own right.

Like NOW, the NWRO contested the gendered valuation of different forms of productivity and desert. As activists nearly collapsed the system by reclaiming the legal benefits they were entitled to, their pressure exposed the cynicism that underlay welfare benefits' residual character. As NOW's salient president noted in 1974, "aid to dependent railroads" did not awaken the social reproach welfare reclaimed by less affluent recipients did.[84] Thus, as they demanded welfare, activists questioned the entire landscape of economic distribution and the state's decisive role in it.

Wages for Housework

During the final years of the NWRO, in the early 1970s, another group of feminists would grab the torch. With a more decidedly Marxist orientation, the Wages for Housework (WFH) campaign demanded government payments for women's labor as homemakers.[85] The campaign,

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[83] *Id.* at 47-48.
[84] Wilma Scott Heide, *supra* note 16 at 5.
[85] For a history of the international Wages for Housework Campaign, its political orientation, actions and significance within feminist activism see Louise Toupin & Käthe Roth, Wages for housework: a history of an international feminist movement, 1972-77 (First English-language edition ed. 2018).

like the NWRO, considered welfare the first salary the government paid for housework.[86] In Brooklyn, NY, two collectives, New York Wages for Housework (NYWFH) and Black Women for Wages for Housework (BWWFH), agitated around welfare to demand material recognition from the government of housework's value.[87] These collectives questioned how society assigned a monetary value to productive and reproductive social labor. Cleaning, feeding, and childrearing were not natural callings but actual forms of work. This critique extended to, and called into question, every level of society. Its goal was to disrupt the existing social organization by standing for concrete policy alternatives that materialized a revolutionary political project. This included (but was not limited to); demands for quality housing ("A WORKPLACE WE PAY RENT FOR! !");[88] vacations from housework; welfare; all-day free daycare centers; free and non-coerced medical care; and, of course, wages for housework ("Now and Retroactive").[89] In short, a new world had to be established—a new form of social organization—beyond patriarchal structures.

For example, in 1976, BWWFH held a public meeting that was "a tremendous success in bringing together Black women"[90] to share their experiences on how the budget crisis affected women's life: discussions about housework, welfare cuts, the city university, daycare and "victories of women internationally."[91] It also featured "a presentation on the struggle of Black

[86] Silvia Federici & Arlene Austen, Wages for Housework The New York Committee 1972-1977: History, Theory, Documents, (Silvia Federici & Arlene Austen eds., Second ed. 2018), 101-106.
[87] *See id.*
[88] *Id.*, 63.
[89] *Id. at* 61, 71.
[90] *Id.*, Document 6.4, 116.
[91] *Id.*

women, particularly Black welfare mothers, against forced sterilization."[92] Their emphasis on forced sterilization reflected activists' first-hand knowledge of what scholar Dorothy E. Roberts later identified as the peak of the infamous "government-sponsored family-planning programs [that] not only encouraged Black women to use birth control but coerced them into being sterilized."[93]

Though BWWFH took the lead in the fight against sterilization, NYWFH had also articulated this demand in earlier years. A 1975 pamphlet on forced sterilization by NYWFH said that Wages for Housework meant "the power to resist forced sterilization as well as forced maternity."[94] Even more, it required "the power to decide whether or not we [women] want to have children, when, how many, and under what condition."[95] The question was placed outside the abortion/no-abortion, sterilization/no-sterilization binaries and onto a broader inquiry over the conditions of possibility for childbearing. At issue, instead, was how to organize care and production as matters of freedom. Both groups were deeply critical of the government's sterilization policies *and* of resorting to back-alley abortions due to the lack of access to safe abortions.[96] The abortion question was only intelligible within a broader narrative of the conditions

[92]Silvia Federici & Arlene Austen, Wages for Housework The New York Committee 1972–1977: History, Theory, Documents, (Autonomedia 2d. ed. 2018).
[93] Roberts shows government sponsored forced sterilization peaked in the 1970s. *See* Dorothy E. Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty, 122 (1997).
[94] Wages for Housework The New York Committee 1972-1977: History, Theory, Documents, 54, (Silvia Federici & Arlene Austen eds., Second ed. 2018).
[95] *Id.*
[96] *Id.* at 56–61.

that restricted women's freedom—functionally subedited to the campaigns' critique of the economic expropriation of women's (unpaid house) work.

Feminist freedom as a conversation

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

Feminist print culture reveals this broad diversity, from pamphlets to newsletters to magazines to how-to guides, including how to start a daycare,[97] how to fix a car,[98] and women-made health guides.[99] Contraception and abortion providers could usually be found alongside self-

[97] A typical collection of reflections and notes on how to start and sustain a childcare center was the "Women's Liberation Notes on Childcare" that included: Cooperative Nurseries, By Rosallyn Baxandall / Child-Care--Who Cares? By Vicki Breitbat / Children are only little people By Louise Lucas among others, all had been reprinted from other early 1970s publications.

[98] For example, some feminists elaborated a manual to repair cars' breaks intended for women who had no previous mechanical knowledge. The manual's preface opened with the following note "This section is written by and for women, but we hope men will read it too" to then present the image of a woman who was "frightened of cars" and felt that "machines chewed at her" to then invite women to overcome their fears. Vivian Rothstein Papers, 1924-2017; a people's car repair manual FIXING BRAKES, 1972, People's Press, MC 995, Box 11, F. 11, SLRIHUC.

[99] Perhaps the most famous and widely distributed was the Boston Women's Healthcare Collective "Our Bodies, Our Selves: A Book by and For Women." The first iteration of what would be the book was a booklet called "Women and their Bodies a course" was a newsprint booklet published by New England Free Press in 1970, which was followed by a new edition in which the collective changed the cover and name of the booklet to "Our Bodies, Our selves: A Course by and for Women" in 1971, in 1973 they launched a Second Edition which was published by Simon and Schuster, followed by a Third and Fourth Edition *Revised and Expanded* in 1976 and 1979 respectively. The Third and Fourth Editions constituted "major revision of the book, with new content and new topics" as the

care programs. Neither quantitively nor qualitatively was abortion particularly significant within this culture. An emblematic example, condensing several feminist resources, was the 1973 New Woman's Survival Catalog, which "meant, above all, to be a self-help tool for ALL women to take control of their lives."[100] The catalog consisted of a massive set of feminist resources divided into nine areas: communications, art, self-health [sic], children, learning, self-defense, work and money, getting justice, and building the movement.[101] Pieces went from legal aid resources to journal subscriptions to poems, seminars, and everything in between.

Among thousands of others, the catalog included 13 pieces by some of NOW's branches.[102] The litigation section contained an extract on the NOW Legal Defense and Education Fund's (NOW LDEF) campaign "to end sex-role stereotyping and the consequent discrimination against women as well as to change the underlying values."[103] The Legal Defense and Education Fund had been separated from NOW in 1970 to function as its education and litigation affiliate. In order to be classified by the IRS as a 501(c)(3) organization (that is, tax-exempt and, more

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authors invited "more women to contribute their expertise and experience." The first four editions were widely distributed among activists. Anecdotally, one of the interviewees in HBO's "The Janes", interview Crystal O., a black woman who had visited the Janes when she accompanied her friend to get an abortion commented that in that visit, she got a copy of 'Our Bodies, Our Selves' which was available for free in the waiting area. She said "I guess that's where I got my sex education 'cause I did read that book from beginning to (laughs) yeah." (57:15-57:47). The documentary's recreation scene shows the Third or Fourth edition. Though because of the year it could have only been either version of the first edition, probably the second. More editions followed, the book has been adapted and updated up to its last edition in 2011. But there is a break between the 1979 edition and those which followed, not only did the aesthetic change but according to the organization the book was "Completely rewritten, the 1984 edition expands to 647 pages (from 383) and includes new chapters…" *See* Our Bodies Ourselves Today, Our Bodies, Ourselves: The Nine U.S. Editions, https://www.ourbodiesourselves.org/about-us/our-history/publications/our-bodies-ourselves-the-nine-u-s-editions/

[100] The New Woman's Survival Catalog (Kristen Grimstad & Susan Rennie eds., 1973).

[101] *Id*. at 5.

[102] The New Woman's Survival Catalog, *supra* note 103.

[103] *Id.* at 189.

importantly, able to receive tax-deductible contributions), it needed to operate exclusively for charitable, educational, or scientific purposes.[104] NOW LDEF maintained its affiliation with NOW but operated independently, without engaging in activities on behalf of candidates running for public office and limiting its lobbying expenditures to maintain its tax status.[105] Abortion as a central theme was wholly absent from the 13 NOW items in the *Catalog,* which instead consisted of handbooks dedicated mainly to women's depiction in the media and employment issues.[106]

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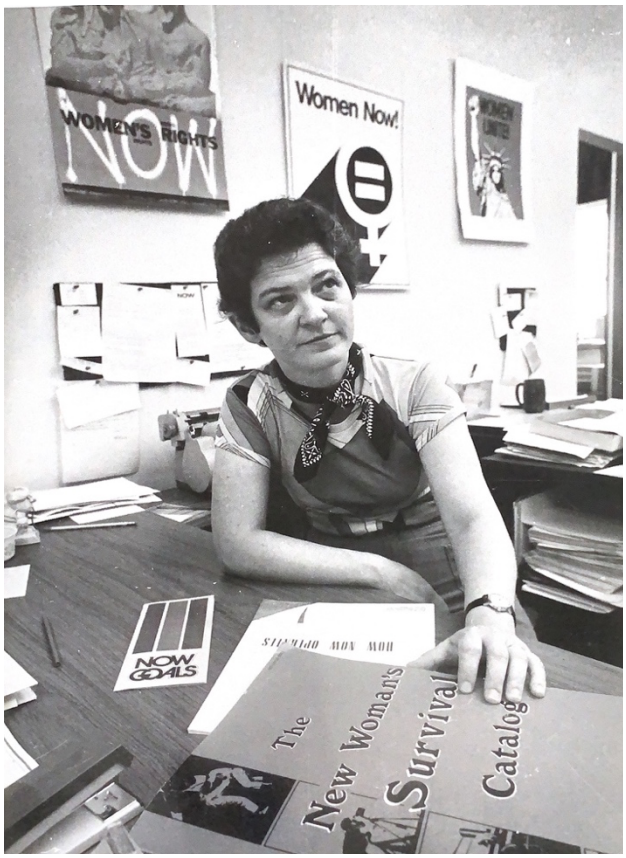
[104] 26 U.S.C. 501(c)(3).

[105] Memorandum from the Now Legal Defense and Education Fund on How to Seek Support for Cases and Projects 2 (Sept. 1987), MC 623, Box 33, F.5, SLRIHUC.

[106] The NOW items included from the national NOW division were in pages 17, 29, 164, 175, 186, 200, 207 and 211. The NY NOW item was in page 19, the Eastern Massachusetts NOW in page 186 and NOW LDEF's bit in page 189 of The New Woman's Survival Catalog, 1973. The 10 national NOW pieces included information about: NOW Federal Communications Kit (on the second paragraph it mentioned abortion at passing alongside "childcare, ERA, etc." as controversial issues that could be confronted with help from the kit when stations failed to present balanced views), The NOW Press Handbook, Do It NOW (NOW's newsletter), poster of the employment sex discrimination campaign ("Hire him, he's got legs"), Women and Credit manual, Handbook for a corporate Suffragette, Business and Industry Discrimination Kit, Write On! A handbook for effective letter writing and a page-long presentation of the organization including its statement of purpose, frequently asked questions and a list of some of its publications. The page-long presentation included a section on the "Goals of NOW" that listed the "Equal Rights Amendment, Child Care Centers, Anti-poverty measures, Control of women's rights to reproduction, Enforce Law Banning Sex, Discrimination in Employment, Equal Education Opportunities, Partnership Marriage and Responsible Divorce Reform" (p. 207). The NY NOW piece was about Feminist Speakers, the bit promoted three speakers; one was particularly interested in "attracting younger members" one was "an authority on abortion and contraception" and one was a "frequent speaker on 'The Images of Women'" and the Eastern Massachusetts NOW one about "Sex Discrimination in Employment: What to Know About it, What to Do About it." *See* The New Woman's Survival Catalog, *supra* note 102.

Figure 1. NOW regional director and National Board member Mary Jean Collins at the organization's office in Chicago with *The New Woman's Survival Catalog*, 1975. Source: Mary Jean Collins Papers, M.C. 493, PD.2, SLRIHUC.



All of NOW's pieces related in some way to the law, seeking efficient ways to transform it, helping women enforce it, or simply mobilizing it to criticize sexist practices.[107] More generally, though abortion did not feature in any of NOW's pieces, it did emerge among the *Catalog's* concerns.[108] It appeared prominently in the self-health section and sporadically in stickers, patches,

[107] See *supra*, note 106.
[108] See *supra*, note 106.

and other feminist merchandise.[109] Nevertheless, even then, it was a species of the self-health genre—a larger preoccupation with women's power in healthcare.

3. Abortion without *Roe* (or reproduction through the lens of feminist freedom)

Abortion

Across the 1960s and 1970s, for NOW, the NWRO, NYWFH, BWWFH, and feminists with innumerable other affiliations, abortion as a "women's issue" was regarded as one more knot to disentangle within a complex web of structures of patriarchal dominance. In the *Catalog* the previous section referred to, abortion was considered part of self-health—a program more generally concerned with defying male dominance in healthcare.[110] Self-health activism rebelled against the *status quo* that relegated women to passivity *vis-á-vis* (overwhelmingly male) doctors. It included all phases of healthcare, from knowing one's anatomy to the provision of treatment when needed.[111] Self-health guides and institutions empowered women to discover their needs and take matters into their own hands. At every step of the way, women's knowledge and *praxis* contested the medical mainstream's monopoly over healthcare.[112] Women identified the course of treatment, defined the way in which it would be provided, and delivered the service.

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[109] See *supra*, note 106
[110] See *supra*, note 106.
[111] *Id*. at 71-91.
[112] The New Woman's Survival Catalog, *supra* note 102.

More broadly, self-health was part of the women's health movement, a feminist healthcare crusade.[113] Across the United States, particularly in large cities, feminist collectives delivered women the education and services the medical establishment had denied them. By 1975, the women's healthcare movement had 1200 groups, and at least 42 feminist clinics were operating that year.[114] As a part of this canvas, abortion was but one of many ways to question the production and use of medical knowledge. Feminist health centers were crafted as spaces defiant of male dominance, aimed at "making real changes in the imbalance of power."[115] Even at the cost of efficiency and internal tensions, managing the centers through a horizontal and democratic administration was paramount to most activists. In addition to more conventional services, several centers offered cervical explorations and group gynecological sessions.[116] Abortion was another item in the long list of feminist healthcare provisions. In this context, even when abortion was the main focus, as for the JANE Abortion Service, how it would be delivered was a vital part of the question.[117]

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[113] See Sandra. Morgen, Into our own hands: the women's health movement in the United States, 1969-1990 (2002); Dudley-Shotwell, *supra* note 64 (describing the feminist "self-help" movement that encouraged women to study medicine and treat themselves).

[114] Spain, *supra,* 113, 138, note 55.

[115] The statement was made by the California group Feminist Women's Health Center that started out as a Los Angeles based self-help group, grew into a women's health center, and developed several self-help groups as well as two additional Women's Health Centers, one in Santa Ana and one in Oakland. Feminist Women's Health Centers, in The New Woman's Survival Catalog, 71, *supra* note 81., at 71.

[116] Cervical explorations usually consisted of all-female group sessions of mutual anatomical discovery. The Second Wave, in The New Woman's Survival Catalog, *supra* note 102, at 73. In the words of one assistant: "When I first saw another woman's cervix, I thought that it was pretty gruesome, and why were all these women excited about it? Then, when I saw my own, I couldn't believe that now I actually had access to it. […] I became overwhelmingly awed, and even spiritual! Recovering from the spiritual part of this pretty quickly, I realized that by regular examination I, too, could have some part in keeping myself healthy." *Id.*

[117][117] JANE was the name that stuck in 1969 for the anonymous and personalized phoneline administered by University of Chicago students that provided abortion counseling and referrals ("Hi, this is Jane"). Women looking to terminate a pregnancy would get connected to providers by the counselling line attended by "Jane". The abortion hook

The JANE collective—an underground abortion service that operated from 1969 to 1973 in Chicago—was deeply concerned with women's power.[118] Of course, providing safe abortions in the context of criminalization was paramount, but so was providing them in a way that recognized and returned women's command over their lives and decisions.[119] Members of the collective took special care that the spaces in which they gathered women and their companions ("The Front") to take them to where the abortions would be performed ("The Place") were amenable and warm.[120] Additionally, many activists recall the significance of the affective-emotional component of the service. Accompanying women that were often scared to death by explaining everything in detail and supporting them through the procedure, holding their hand, or

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that started as a one-woman enterprise soon became a group effort. In time, JANE not only counseled but also secured a space to directly provide abortions performed by third parties. Members of the collective would accompany women all through the process to ensure they felt secure and cared for. The building where the services were delivered emulated a home environment as it was important for members of JANE that patients felt comfortable and at ease. Members of the collective established closer relations with the providers and began assisting the procedures. When they found out that their main provider was not a doctor but a knowledgeable health worker, JANE began to wonder whether it would be best for them to personally perform the abortions. They started learning and eventually took over the operation. By 1971 all counseling and abortions were provided by JANE. They charged a fee for their services but accommodated women who could not pay. They took pride on never denying an abortion to someone who could not afford it. In May of 1972 seven members of JANE were arrested under the charges of committing and conspiring to commit abortions, charges that were dropped after the Supreme Court decided *Roe v. Wade* the next year. See the newspaper articles on JANE and other women's health groups J. Knauss, "A View from the Loop (The Women's Health Movement in Chicago)," in Box: 6; Folder: 10, CDMLSCE; Pauline Bart, "Unalienating Abortion, Demystifying Depression, and Restoring Rape Victims," in CDMLSCE, Box: 6, Folder: 4, Item: 2; "JANE. The Most Remarkable Abortion Story Ever Told" in *Voices*, June (1973), CDMLSCE, Box: 6, Folder: 4; Item: 3. On JANE see also the documentary *Jane, an Abortion Service*, directed by Nell Lundy and Kate Kirtz (Inc. Juicy Productions, Independent Television Service, and Women Make Movies, 2010).

[118] For a history of the JANE abortion service, written by one of its members see Laura Kaplan, The Story of Jane: The Legendary Underground Feminist Abortion Service (2019).

[119] At that point abortion was a criminal offense in Illinois under Ill. Rev. Stat. ch. 38, § 23-1 (1971): "(a) A person commits abortion when he uses any instrument, medicine, drug or other substance whatever, with the intent to procure a miscarriage of any woman. It shall not be necessary in order to commit abortion that such woman be pregnant or, if pregnant, that a miscarriage be in fact accomplished. A person convicted of abortion shall be imprisoned in the penitentiary from one to 10 years. (b) It shall be an affirmative defense to abortion that the abortion was performed by a physician licensed to practice medicine and surgery in all its branches and in a licensed hospital or other licensed facility because necessary for the preservation of the woman's life."

[120] *See* activists' descriptions of the process in Jane, an Abortion Service: A Documentary, (2010).

offering other forms of physical reassurance was as important as providing access to abortion.[121] Initially, the procedure was performed by a man the JANEs believed was a physician.[122] The situation changed after they discovered he was not, and from then on, JANE members performed the abortions.[123] As JANEs personally provided abortions to women in need in the space they had built, they offered women a much-needed abortion service, as much as feminist self-affirmation through collective and intentional care.

Even in NOW, the most moderate arm of the movement, the terms by which activists would struggle for abortion were not clear-cut. In a confidential letter to some of NOW's key leaders in 1970, Betty Friedan reproached NY NOW chapter's decision to oppose the NY abortion repeal bill proposal. According to Friedan, NY NOW opposed the legislation "because it mentions [d]octors; that will prevent midwives [from] performing abortions, or something like that" in circumstances that the bill had been "drawn up as a result of NOW's position on abortion."[124]

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[121] The service provided an experience intentionally different from the one women would receive from the medical establishment: [T]he woman seeking an abortion] was included. She was in control. Rather than being a passive recipient, a patient, she was expected to participate. Jane said, "We don't do this to you, but with you." By letting each woman know beforehand what to expect during the abortion and the recovery stage, and then talking with her step by step through the abortion itself, group members attempted to give each woman a sense of her own personal power in a situation in which most women felt powerless. Jane tried to create an environment in which women could take back their bodies, and by doing so, take back their lives. Laura Kaplan, The Story of Jane: The Legendary Underground Feminist Abortion Service 10 (2019). *See also* Jane, an Abortion Service, *supra* note 120.

[122] *Id.* at 117.

[123] *Id.*

[124] Urgent and Confidential Letter from Betty Friedan to Kay, Aileen, and Eliza 7 (Feb. 12, 1970), MC 575, Box 126, F. 1536c, SLRIHUC). In the Spring of 1970, Betty Freidan left the presidency after a quarrel with the organization's Executive Director and the NY NOW Board of Directors. *Id.* at 3. The dispute involved both personal and political reasons; including questions of character, strategy, and homophobia—the disagreement over abortion did not appear to be decisive for the break, but an example of their incompatible strategies. *See id.* at 6. It constituted, in the eyes of Friedan, one more example of NY chapter's misalignment with the National Board. *Id.* With regards to the proposed abortion legislation, she emphasized: "But it is a genuine repeal bill; it removes abortion from the criminal code, and recognizes the right of a women [sic] not to bear a child against her will. [A]nd to get medical help in so going. Jean Faust and I and various others from NOW are working for it, but lately

Irrespective of strategic considerations, the disagreement between the NY NOW chapter and Friedan was also substantive. They simply did not concur on how central the question of who would perform an abortion was *vis-à-vis* decriminalization. The NY NOW chapter and Friedan had differing visions of the contours of the abortion question and their relative importance.

As a matter of national politics, while "NOW played a crucial role"[125] in the formation of the National Association to Repeal Abortion Laws (NARAL), when it weighed in on abortion, it usually did so as part of a larger strategy that exceeded the abortion question. For example, in a 1969 memo to NOW's leaders, Executive Director Dolores Alexander invited chapters and regions to consider a new attack on abortion restrictions which would "probably . . . be proposed by Congresswoman Shirley Chisholm at a press conference . . . after the weekend of board meetings of the new National Association to Repeal Abortion Laws."[126] Chisholm was the first African American woman to serve in the national Congress and would soon become the first to seek a major party presidential nomination.[127] Formed as a community activist, Chisholm's politics were profoundly tied to her commitment to the "have-nots" and included fighting for increased federal

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people have been stopping me and saying "I like [w]hat you say, but not your organization. They don't really want to do a[n]ything about abortion." *Id.* at 7–8. In the letter, Friedan underlined the word doctors. *Id.* at 7.

[125] Freedom for Women Week Memorandum from Dolores Alexander, Executive Director of NOW, to NOW Officers, MC 575, Box 121, F.1473, SLRIHUC..

[126] In the memo "to all NOW officers, board members, chapter presidents and convenors" among other matters, Alexander broadcasted good news on abortion: "you should all be aware that the California Supreme Court ruled in favor of Dr. Leon Belous, who was testing the old California abortion law." Emphasizing that, "[i]ncidentally, this was the case which the California chapters were supporting and for which the national board voted approval of an amicus brief at the June board meeting in San Francisco." In view of this decision, Dolores pointed regional conferences "might want to consider a new frontal attack on abortion" and stressed that "As you know, abortion is one issue about which the young. Women—both students and working women—of this country feel very strongly about and are ready to take action on." Here, abortion was one more issue on which the organization participated, notably, its significance appeared to be crossed by a generational divide. *Id.*

[127] Chisholm '72: Unbought & Unbossed, (2004).

funding for education, daycare, and a guaranteed minimum income for all families.[128] It is not coincidental that NOW's convergence with NARAL was over an issue that also concerned Chisholm.

As abortion did not feature as NOW's central demand, the group's alliance with organizations that favored abortion's decriminalization was not inevitable but contingent upon their programmatic convergence, as the example that follows illustrates. In 1971, Southwest Foundation conducted an experiment on birth control "involving 398 women—of whom 80 per cent were Mexican-Americans—", half of which had been referred to the foundation's clinic by Planned Parenthood in San Antonio, Texas.[129] In response, NOW's National Board decided to "urge its 200 chapters to seek legislation in every state to prohibit medical experimentation on women through public health services such as Planned Parenthood."[130] The clinical trial performed on Chicana women NOW was protesting against resulted in the pregnancy of several participants who had been "under the impression they had been taking birth control pills."[131] In the board's eyes, Planned Parenthood's involvement in the San Antonio birth control experiment constituted not only an abusive practice but one that reflected women's—and, particularly, low-income

[128] However, she did not think of herself primarily as a "an innovator in the field of legislation" and "she often chose to work outside the established system." Chisholm, Shirley Anita | US House of Representatives: History, Art & Archives, https://history.house.gov/People/Listing/C/CHISHOLM,-Shirley-Anita-(C000371)/ (last visited Feb 6, 2023).*See generally* Shirley Chisholm, Shola Lynch & Donna Brazile, Unbought and Unbossed: Expanded 40th Anniversary Edition (Scott Simpson ed., 40th edition ed. 2010); Barbara Winslow, Shirley Chisholm: Catalyst for Change, 1926–2005 (1st edition ed. 2013); Shirley Chisholm, Shola Lynch & Donna Brazile, Unbought and Unbossed: Expanded 40th Anniversary Edition (Scott Simpson ed., 40th edition ed. 2010).
[129] David Shute, *San Antonio Express 07 Jul 1971, page Page 48*, Newspapers.com.
[130] Press Release, Nat'l Org. of Women, NOW Board Concludes Atlanta Meeting (Nov. 1971), MC 496, Box. 200, F. 8, SLRIHUC.
[131] *Id.*

women's—general powerlessness against corporate interests.[132] NOW collaborated with Planned Parenthood on other projects, but, as the Chicana medical experimentation abuse exposed, their ideological alignment was not straightforward.

At the same time, NOW vehemently opposed the "so-called state protective laws" that discriminated against women at the state level by setting labor regulations differentiated by sex.[133] The organization called out that such restrictions were a "subterfuge for depriving women of good jobs and promotions." [134] Though NOWers did not refer to laws prohibiting medical experimentation as protective legislation, what they demanded from the law in those cases was precisely that which they opposed in the labor setting: for the legislator to decide what was in women's best interest and to ban what went against it. The opposition to or endorsement of protective legislation—be it in the area of labor or consent in the context of medical experimentation—was thus not a one-size-fits-all matter, but a politically sensitive debate that depended on the underlying circumstances. The autonomy NOW reclaimed at the workplace was distinct from the legislative protection it promoted in favor of poor women against institutionalized

[132] According to a Texas news article, "Mexican-American groups have denounced the project because it included a number of low-income, poorly educated, Mexican-American women." Shute, *supra* note 129.
[133] NOW scrutinized the state protective laws "with the goal of extending to men the protections that are genuinely needed; and of the abolition of those obsolete restrictions that today operated to the economic disadvantage of women by depriving them of equal opportunity." Memorandum from Nat'l Org. of Women, Chronological Summary of National Organization for Women Conference Resolution, Policies, and Board Decisions,1966-1971, MC 496, Box. 1, F. 7, SLRIHUC.
[134] NOW opposed labor laws that discriminated against women by setting differentiated standards by reason of sex. Among these, it included maximum hours, "unfair weight-limit restrictions" and prohibitions that excluded qualified women from "white collar jobs aboard ships." Press Release, Nat'l Org. of Women, An Invitation to Join N.O.W. National Organization for Women (Nov. 1967), MC 496, Box. 1, F. 2, SLRIHUC.

abuses. Feminist freedom could require "protective legislation" or be abridged by it. The evaluation depended on the particular conditions of the prohibition.

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

However, the fact that power and the economic preconditions women needed to exert it were NOW's chief concerns during *feminist freedom* did not always stick to feminists' memories. Years later, in retrospect, Friedan declared that abortion had not been incorporated in the early documents of NOW as it was "too controversial."[135] Following Friedan, one could argue that

[135] Shute, *supra* note 131.

abortion's occasional absence was due to its contested nature. However, even after it was formally adopted by the organization's platform in 1967, mentions remained infrequent.[136] Friedan's turn-of-the-millennium recollection of abortion's diminished role due to its polemical character did not match contemporary written primary sources, apparently due to abortion's subsequent rise within *Roe feminism*.[137] Her disagreement with the NY NOW chapter escaped such narrative, as did NOW's condemnation of Planned Parenthood's abuse. The linear story of the quest for abortion Friedan's memoir hinted at had little to do with NOW's historical trajectory. Since NOW passed its Bill of Rights—incorporating abortion decriminalization among its platform of reproductive rights—, abortion remained an existing yet secondary concern for the organization. Moreover, after the initial division that the issue raised within NOW, no major polemics developed within the group, yet abortion remained a lesser concern.

The "Texas case" and the ERA

For NOWers, "the Texas case" (as the *New York Times* had referred to *Roe v. Wade* when it came out) did not inaugurate abortion as a feminist issue.[138] Abortion had been a concern for

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[136] On its Second National Conference the organization committed to support the repeal of all abortion laws. After a "hot and heavy" discussion on the matter some members decided to leave the organization but "NOW emerged shaken, but strong." *See* NOW Records, 7, *supra* note 32.

[137] Friedan claimed in her memoirs, written in 1999, that "NOW's Statement of Purpose was adopted at that first meeting as I'd drafted it, with one exception. I had wanted to confront abortion but was advised not to include it because it was too controversial. (It wasn't until its second year that NOW confronted the issue)." Friedan, *supra* note 25, at 176. First, it was not true that the Statement was adopted exactly as Friedan had drafted it but without abortion. Pauli Murray's proposal, which focused more decidedly on economic and material matters than Friedan's was ultimately adopted. Second, NOW's early documents even after abortion was incorporated into the bill of rights reflect the relative insignificance of the issue which by no means constituted a priority for the organization during the early 1970s. Though Friedan was more invested in abortion than other activists, it was by no means the fight to which she dedicated most of her time and efforts. *See* Rosalind Rosenberg, Jane Crow: the life of Pauli Murray, (2017).

[138] The New York Times featured the case on its cover, under that day's headline "Lyndon Johnson, 36th President, is Dead; Was Architect of 'Great Society' Program." The January 23, 1973 front page of the *Times* read: "High

many of its activists since before the organization's formation, and it had officially entered NOW's agenda at its Second Annual Conference in 1967.[139] But, more notably, when the decision came out, it did not have any significant effect on the organization's priorities. It neither advanced nor demoted abortion's relative position within the vast array of feminist demands. Even when *Roe* came out, *feminist freedom* (or feminism without *Roe*) remained the leading framework for almost a decade. Before the decision, NOW had occasionally referred to abortion, but mentions were sporadic and less significant for the organization than equal rights (not necessarily seen as "judicially enforceable entitlements") and other economic demands.[140] Abortion was by no means their primary concern. Far more critical, for example, were the ERA and child care.

For instance, a 1973 booklet that broadcasted NOW's accomplishments in child care stated that "[c]hild development in this country is a top priority of the National Organization for Woman (NOW). We have yet to realize this dream, but NOW chapters in every state are actively working

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Court Rules Abortions Legal the First 3 Months." The newspaper's front page referred to the Supreme Court, the legality of state bans on abortion and reactions to the new decision. There was no mention of "Roe v. Wade" as such. In the entire paper, there were only two specific references to the case. The first, contained in the body of one of the articles, clarified that; "In the Texas case, 'Jane Roe' an unmarried pregnant woman who was allowed to bring the case without further identity, was the only plaintiff." The second, and last, corresponded to the ordinary identification of the case before describing its content: "Following are excerpts from . . . Jane Roe v. Henry Wade, the Texas abortion case." Thus, notwithstanding the decision's presence in the paper the case, *qua* case was barely mentioned. Despite the five articles and other pieces that covered the decision, in addition to its noticeable appearance on the cover, the words "Roe" or "Roe v. Wade" were only uttered twice. High Court Rules Abortions Legal First 3 Months, The New York Times, Jan. 23, 1973, https://timesmachine.nytimes.com/timesmachine/1973/01/23/issue.html.

[139] See NOW Records, *supra* note 61.

[140] In 1969, Betty Friedan had listed an abortion case among the "concrete victories . . . won by NOW in 1969." The list included the Colgate Palmolive case in which the court ruled that employers cannot exclude women from jobs requiring lifting 35 pounds or more, the memo noted this decision followed Weeks v. Southern Bell Telephone, celebrating the NOW legal committee "did the pioneering work in both cases . . . ." The memo also celebrated the "landmark decision by the California Supreme Court . . . ruled that the old California criminal law on abortion was 'an invalid infringement upon the woman's constitutional rights' under the 14th Amendment." Memorandum from Betty Friedan, President of NOW, to All Members of NOW (1969), MC 499, Box 3, F. 3, SLRIHUC.

towards the goal . . . to establish a network of developmental childcare centers, free from sexism. We are catalysts, organizers and dedicated feminists who won't change our minds - or the subject."[141] No comparable publication spoke of abortion in those terms at the time. Precisely the year the Supreme Court recognized a woman's (and her doctor's) constitutional right to abortion, NOW was far more concerned with what society ought to do once a child was born into the world, and the responsibility over her upbringing was laid on her mother's shoulders by Americans' social, cultural, and institutional arrangements. As part of a larger canvass of *feminist freedom*, abortion needed to be read with the myriad of other efforts directed at securing women's power so they could meaningfully exercise their freedom.

So unremarkable was the judicial debate over abortion that when the Supreme Court decided *Roe v. Wade*, there was no explicit mention of it in NOW's press releases.[142] In the entire year, there was no mention of *Roe v. Wade*, nor any other abortion case.[143] It was not that the organization was indifferent to abortion (NOW had, after all, already taken a stance on the matter and commented on other abortion decisions), but rather that both abortion and *Roe* were not as significant to the organization as they would eventually become.[144]

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[141] Tery Zimmerman, NOW's Child Care Accomplishments (1973), MC 496, Carton 42, F.37, SLRIHUC.
[142] Press Releases, National Organization for Women (Jan.–Aug. 1973), MC 496, Box 200, F.10, SLRIHUC; Press Releases, National Organization for Women (Sept.–Dec. 1973), MC 496, Box 200, F.11, SLRIHUC.
[143] *Id.*
[144] For example, the December 6, 1969 Board meeting's decision to urge members to use the judicial decisions on labor and abortion to demand their rights. The abortion decision was made by California's Supreme Court in *People v. Belous*. 458 P.2d 194 (Cal. 1969). The summary of the meeting reflected the board's decision to "[c]all upon women to use the new court decisions to demand their right to abortion and to jobs of their choice." *See* NOW Board of Directors, *At the Board of Directors Meeting in New Orleans, La. On December 6, 1969*, Chronological Summary of National Organization for Women Conference Resolutions, Policies, and Board Decisions, 1966–1971

NOW's annual conference occurred in mid-February of 1973, less than a month after *Roe v. Wade* was decided. A chilly Washington, D.C. witnessed a delegation of (mostly) women and men claim "the future is RevolutionNOW [sic]" as they defined strategies and routes for the year.[145] Gathered at a hotel two blocks north of the White House (where a different President's Day celebration was taking place), activists could almost grasp the sense of urgency that had invigorated the organization from its very formation.[146] Would 1973 be the year the ERA would finally be ratified? Would the organization succeed in its aspiration to "bring women into full participation in the mainstream of American society"?[147] The year 1972 had been a one of relative success; the foremost celebration concerned NOW's achievements against labor discrimination, which it declared its highest priority, alongside the ERA's ratification.[148] There was room for optimism.

(Dec. 6, 1969), MC 496, Box 1, F. 7, SLRIHUC. More generally, the organization had broadcasted other judicial decisions, in April 27, 1971, for instance, NOW issued a two-page release about *Southern Bell Telephone Company* that began by communicating that "[i]n a landmark decision, a woman who charged Southern Bell Telephone Company with sex discrimination has been awarded $31,000 in pay back." NOW Records, Southern belles beat Southern Belle, 1971, MC 496, Carton 200, F.8, SLRIHUC.

[145] National Organization for Women, The Future is RevolutionNOW: NOW 6th Annual Conference (February 17–19, 1973), MC 496, Box 21, F. 1, SLRIHUC.

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

[147] NOW Temp. Steering Comm., An Invitation to Join - September, 1966, MC 496, Box 1, F. 2, SLRIHUC.

[148] On employment, *see* Katherine Turk, Equality on Trial, 39, (University of Pennsylvania Press ed. 2016). For the ERA and NOW's strategy, *see* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 817, 92 Calif Rev 755 (2004).

NOW had every reason to be hopeful as it continued to advocate for women against what they viewed as their most pressing problems. Poverty was one such problem, and the Conference resolved to make 1973 NOW's Action Year Against Poverty.[149] The organization's 400 chapters would coordinate their efforts through a national task force that would concentrate on "four legislative goals" revising: the Fair Labor Standards Act and similar state laws to provide for a minimum wage of at least $2.50 per hour [equivalent to $17.5 November 2022 USD] and extension of the Act to include all workers, including domestics; passage of a comprehensive developmental child care program; complete overhaul of the welfare programs to eliminate variations in requirements and payments; and passage of legislation to provide for a full employment program for the United States….[150] Economic deprivation, labor, and feminist freedom were inextricably linked.

Tellingly, the booklet of that conference featured—presumably for the first time—"choice" in an official national NOW publication: "Right to Choice/The Power to Choose."[151] In what would be the year against poverty, and had recently seen *Roe v. Wade*, NOW underscored the potential of "choice" as a vehicle for women's freedom for the first time. However, the choice in question was not abortion but career advancement.[152] The other side of the economic struggle labor women confronted, the one "career women" faced, was choice in these terms. Most activists

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[149] NOW's 6th Annual Conference "The Future is RevolutionNOW", 6, 1973, MC 496, Box 21, F. 1, SLRIHUC.
[150] *Id.*; *CPI Inflation Calculator*, U.S. Bureau of Lab. Stat., https://www.bls.gov/data/inflation_calculator.htm. In 1974, NOW succeeded in including domestic workers under the purview of the Fair Labor Standards Act, the other legislative goals remain pendant.
[151] *See* Nat'l Org. of Women, The Future is Revolution Now 13, (MC 496, Box 21, F.1,).
[152] For a historical account of feminists' struggles and visions for rights in the workplace, and their different iterations depending on women's class and race. *See* Turk, *supra* note 28., at Chapters 5–6.

probably missed the concept's debut as they skimmed through the conference booklet's pages. After all, the small and unremarkable letter ad of "Feminist Career Workshops for On the job problems; getting past the wall of male prejudice" that featured choice and "OPTIONS, unlimited" was not likely to draw much attention.[153]

The booklet also contained other career-related ads ("How to Start a Business on High Hopes and a Shoestring" and "The Death of the Dead-End Secretary"), feminist merchandise ("Products for feminists by feminists"), various activists' bios and recommended publications for women and by women ("The Tenant Survival Book" and "The Young Woman's Guide to Liberation").[154] Reading the longer articles in the booklet (NOW's Herstory, its Bill of Rights, and the Seneca Falls Declaration), the dual components—political and economic—of *feminist freedom* come into clear view. The conference's resolutions were primarily economic and aimed at working-class women; minimum wage, daycare, and the inclusion of domestic workers under labor legislation were directly intended to improve the conditions of women trapped on the "muddy floor" (as opposed to those unable to break the "glass ceiling"). In contrast, the content of the services and networks fostered in the conference, also economic, revealed its primarily middle-class constituency, more interested in bringing women into spaces traditionally reserved for men.

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[153] *See* Nat'l Org. of Women, *supra* note 153, at 13. Capital letters in original. In retrospect, so striking was the resemblance to the language that later characterized abortion and choice that despite the anachronym one might almost think the ad was actually encoded. However, the workshops took place in New York where abortion was already legal even before the decision. Moreover, Janice LaRouche, the woman who imparted the workshops would go on along with Regina Ryan to write a book on the topic. *See generally* Janice Larouche & Regina Ryan, Janice Larouche's Strategies for Women at Work (1984).

[154] *Id.*

If NOW's economic preoccupations revealed the organization's class composition, the political ancestors it invoked expressed a unitary notion of feminist citizenship that went from Sojourner Truth, through the suffragettes, and finally to Betty Friedan and Shirley Chisholm. From different political lineages, they all underscored the importance of women's freedom and equality for a capacious understanding of feminist citizenship.[155] This unitary view undergirded NOW's attempts to overcome racial and class contradictions within the organization. A concerned organization committed to re-examining its policies and structures to ensure they did not inhibit minorities' participation. Activists also established a sliding scale for membership dues starting at $0 to democratize NOW's constituency.[156]

Besides choice's undetectable first appearance, the intense three-day reunion endowed NOWers with renewed drive and purposes for the coming months.[157] After all, what had started as a group of 28 women six-and-a-half years ago had grown into a national organization that had since achieved numerous victories.[158] From NOW's standpoint, those victories did not pertain to

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[155] The cover of the booklet featured a picture of Susan B. Anthony and Elizabeth Cady Stanton. The article "Herstory of NOW" summarized the organization's founding and included a picture of a smiling Betty Friedan next to the organization's Bill of Rights with a picture of Bella Abzug and three (unidentified) young girls. *See id.* at 4–5. The booklet also included a poster with Shirley Chisholm's mono (unbought and unbossed) with a plea for economic to counteract the campaign deficit help that added to Chisholm's mono "…AND UNFUNDED". Sojourner Truth appeared through her words that were reproduced in the booklet and gave the name to the theatrical production presented by NOW, "…What Time of the Night It is" *Id.* at 8–9. ("I'm 'round watchin' these things, and I wanted to come up and say these few things to you, and I'm glad of the hearin' you give me. I wanted to tell you more about Woman's Rights, and so I came out and said so. I am sittin' among you to watch; and every once and awhile I will come out and tell you that time of night it is. Sojourner Truth").

[156] On the press release that followed the 1973 national conference, NOW "committed itself to re-examine its own structure policies and practices to ensure that the institutional racism that has affected everyone doesn't unconsciously inhibit minority women from participating in and with NOW and established a sliding scale for its own dues (starting with $0.00) to ensure that persons of lower economic resources and the working poor can join NOW." Aileen c. Hernandez Papers, NOW National Press Releases, 1973, SSC-MS-00730, Box 1, SCSCN.

[157] *See* MC 496, Carton 200, F.10.

[158] *See* Turk, *supra* note 28; Turk, *supra* note 30.

abortion in any significant way. Several states had repealed or modified their restrictive abortion laws, and many feminists had been involved. However, that had not been a significant organizational priority. Instead, most of the organization's focus had been on other economic issues iterated differently across women's experiences.

NOW's national media releases in 1973 were predominantly about economic issues and the fight for the ERA.[159] Among its reports were NOW's strike for economic security and ERA advocacy.[160] NOW's support of the "Farah boycott" figured as a fight for all women as the organization joined the strike in solidarity with the Farah Manufacturing Company's "80% women and 95% Mexican-American" workers who were trying to get the Texas-based company to recognize their union.[161] As a part of Women's Equality Day, NOW coordinated demonstrations at Farah distributors across the country.[162] Meanwhile, abortion was not the central issue in any of the releases. That is, the year the United States Supreme Court decided *Roe*, NOW's press releases reflected its concern over a different Texas case—an economic boycott in which the organization expressed its solidarity with workers.

The only mention of abortion, in passing, came with another reproductive rights case. NOW deplored the "allege[d] sterilization of two young women without the informed consent of either woman" in Alabama, stating that "the basic human right to limit one's own reproduction includes the right to all forms of birth control (contraception, including sterilization, and abortion)

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[159] Press Release, Nat'l Org. of Women, For Immediate Release (August 1973), MC 496, Carton 200, F.10, SLRIHUC.
[160] *Id.*
[161] *Id.*
[162] *Id.*

recognizing the dual responsibility of both sexes."[163] The case to which the press release referred was that of two Black sisters; Minnie Lee and Mary Alice Relf, age fourteen and twelve, respectively. Justified solely by their illiterate mother's "mark on what was later learned to be an authorization for surgical sterilization," the Relf sisters had been forcibly sterilized at their public hospital.[164] In its press release, NOW used the label "young women" to refer to the Relf sisters, contrary to the complaint's preference for the term "children."[165] Whereas the variance was partly a reflection of the interventions' different forums and objectives, it also exposed an underlying tension between protection and autonomy. The pressure was latent in constructing the contours of minor women's sexuality, especially if they were Black. The Relf sisters' suit would later be

[163] NOW's Statement declared that: The National Organization for Women, a civil rights organization with more than 50,000 women and men, has always stood for the individual's right to control their own reproductive lives without unwarranted government intrusion. We have insisted that all people regardless of age, economic or marital status should have access to abortion and contraceptive services. We have also stated that, "the basic human right to limit one's own reproduction includes the right to all forms of birth control (contraception, including sterilization, and abortion) recognizing the dual responsibility of both sexes." The Alabama case alleges the sterilization of two young women without the informed consent of either women or the informed consent of their mother in the instance of the mentally retarded woman. As a civil rights organization, we deplore any acts which involve coercion and limit the individual's right of choice. In the absence of any specific guidelines for federal programs with regard to the insurance of the rights of minors, particularly their right to give informed consent, together with no clear federal policy regarding these same matters in the case of the mentally retarded minor, we support the institution of a ban on the use of federal funds for the sterilization of minors until such matters can be debated in open public discussion a clear policies protective of the rights of individuals set forth. Press Release, Aileen C. Hernandez Papers, Statement of National Organization for Women July 9, 1973, SSC-MS-00730, Box 81, SCSCN.

[164] Additionally, a nurse had "required [14 year old] Minnie to sign a false document stating that she was over twenty-one years old and gave consent to the operation." According to the complaint, "Minnie did not understand or what the document meant or authorized." The complaint also included their older sister, Katie Relf (age 17). The Relf sisters had moved to a public housing project in 1971 where "the Family Planning Service" had "began the unsolicited administration of experimental birth control injections to Katie." Complaint at 9, Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). The Court held that "federally assisted family planning sterilizations are permissible only with the voluntary, knowing and uncoerced consent of individuals competent to give such consent. This result requires an injunction against substantial portions of the proposed regulations and their revision to insure [sic] that all sterilizations funded under the family planning sections are voluntary in the full sense of that term and that sterilization of incompetent minors and adults is prevented." in Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974).

[165] *Id*, see note 151 and 152. Complaint for Petitioner at 8, Relf v. Weinberger, 372 F. Supp. 1196 (No. 73-cv-01557). MC 496, Carton 200, F.10, SLRIHUC.

consolidated with another forced sterilization case the National Welfare Rights Organization was litigating to be jointly decided in 1974.[166] Though abortion's mention in the release was anecdotal, it expressed the material ways in which a bare choice—disconnected from socio-economical structures of power—was not the issue.

In previous years, the tone of NOW's press releases had been very much the same. Labor discrimination, the ERA, poverty, and media representation were the most prevalent issues.[167] During its first decade, NOW concentrated its energies on challenging unjust working conditions for women. Class tensions between the professional and the "low-skilled" women laborers, which more often than not also reflected racial divisions, surfaced in the oscillation between the different workplaces and professional interests the organization defended. Still, NOW's concern with economic freedom in women's homes and workplaces was evident.[168] Abortion ought to be read as part of this larger canvas of feminist freedom.

NOW's media releases provide an essential glimpse into the organization's priorities. Choices had to be made to discuss specific issues, not others, in a limited space. Not only did these statements require time and resources, but they signaled with particular eloquence the issues with

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[166] Both cases were finally decided in 1974. *Relf*, 372 F. Supp. at 1204.

[167] See generally Press Release, Nat'l Org. for Women, (1969) MC 496, Carton 200, F.1, SLRIHUC; Press Release, Nat'l Org. for Women, (Nov. 21, 1966) MC 496, Carton 200, F.2, SLRIHUC; Press Release, Nat'l Org. for Women, (Jan. 3, 1967) MC 496, Carton 200, F.3, SLRIHUC; Press Release, Nat'l Org. for Women, (May 18, 1968), MC 496, Carton 200, F.4, SLRIHUC; Press Release, Nat'l Org. for Women, (April 9, 1919) MC 496, Carton 200, F.5, SLRIHUC; Press Release, Nat'l Org. for Women, (Jan. 28, 1970) MC 496, Carton 200, F.6, SLRIHUC; Press Release, Nat'l Org. for Women, (Aug. 17, 1970), MC 496, Carton 200, F.7, SLRIHUC; Press Release, Nat'l Org. for Women, (Jan. 16, 1971) MC 496, Carton 200, F.8, SLRIHUC; Press Release, Nat'l Org. for Women, (Jan. 3, 1972) MC 496, Carton 200, F.9, SLRIHUC.

[168] This was also the case for the movement at large; for an account of feminists' concern with reimagining the home and workplace and their attempts to do so, *see* Swinth, *supra* note 10.

which the organization wanted to be associated. Considered under that lens, abortion's first mention post-*Roe* is particularly interesting. Not only did NOW not mention the Supreme Court's ruling in its press releases throughout 1973, it did not even mention abortion as an issue. The first mention of abortion (beyond its anecdotal appearance in the forced sterilization release) came a year after *Roe*, in relation to one of the anti-abortion constitutional amendment proposals "pro-lifers" were pushing.[169] The release stressed that "most key religious groups favor legal abortion."[170] *Roe v. Wade* as such went unmentioned. At that point, *Roe* continued to be the generic "Texas case" in which the Supreme Court had declared abortion restrictions unconstitutional subject to the new trimester framework.[171]

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[169] NOW Records, Press Release, 1974, MC 496, Box 200, F 12, SLRIHUC, Press Release, Nat'l Org. for Women, (July 13, 1974), MC 496, Box 200, F.12, SLRIHUC; *see* Robert N. Karrer, *The Pro-Life Movement and Its First Years under "Roe,"* 122 Am. Cathol. Stud. 47 (2011). (detailing a review of the "pro-life" response after *Roe*).
[170] Press Release, Nat'l Org. for Women, (July 13, 1974), MC 496, Box 200, F.12, SLRIHUC.
[171] The trimester framework created in Roe established that during the first trimester of pregnancy "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," in the period following the first trimester but before viability "the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health", finally, after viability "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother" Roe v. Wade, 410 U.S. 113, 164 (1973). The trimester framework was replaced by the undue burden standard of Planned Parenthood of Southeastern Pennsylvania v. Casey 505 US 833, 901 (1992). Under the "undue burden" standard "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." 505 U.S. 833, 878 (1992). Subsequent cases interpreted what constituted an undue burden, and what did not. In Stenberg v. Carhart, 530 U.S. 914, 921 (2000), the Court held that a Nebraska statute that criminalized "partial birth" abortions and did not allow for exceptions in cases the health of the mother was threatened, placed an undue burden on a woman's right for abortion and was thus unconstitutional. *Id.* at 921, 946. Later, in Gonzales v. Carhart, 550 US 124, 168 (2007), the Court decided that Congress' Partial-Birth Abortion Ban Act did not impose an undue burden over a women's right to abortion as the most reasonable interpretation was that the act only applied to the intact D&E (dilation and evacuation) method and not to the more common D&E. The Partial-Birth Abortion Ban contained a life-endangerment exception, excluding from the Act "[p]artial-birth abortions . . . necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." '18 U.S.C § 1531. *Casey* remained law of the land until the Supreme Court overturned it and *Roe* on 2022 with *Dobbs*. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

In the following years, abortion slowly gained ground. The first Right to Choose lobbying day was promoted by NOW by the end of 1974.[172] At that point, abortion was still a matter of concern but in no way a high priority. The labor causes that had been central to the organization's national agenda continued to figure prominently among NOW's actions. References to abortion were made in general terms related to legal reform but continued to be infrequent, and the broad *feminist freedom* outlook still prevailed.[173]

Since its founding, NOW's agenda had been characterized by a wide array of concerns. However, that dynamic was slowly starting to change. In 1975, the ERA became an organizational priority as the clock for ratification continued to tick. In a press release on the ERA that year, Eleanor Smeal, "chairone" of NOW's National Board (who would become president in 1977), synthesized feminists' demands by claiming: "[w]e want economic security for our grandmothers, mothers, and sisters as well as for ourselves and our descendants whether they choose to work inside or outside of the home. All women are working women!"[174] In Smeal's eyes, "fully equal status and treatment in the eyes of the law"[175] would enable women to bring about the economic security they needed to participate in society on equal terms. Thus, economic security was directly

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[172] *See* Letter from the National Organization for Women, Report to the NOW National Board , to Congress (July 22, 1974), MC 496, Carton 51, F.12, SLRIHUC.

[173] A representative snapshot of the range of the discussion were the topics activists discussed in conferences. In NOW's 1975 National Conference, in addition to the many workshops, special interest meetings and the plenary sessions, activists were prompted to explore the philosophical "visions, ambiguities and tensions" within the feminist movement including: "Seizing the means of reproduction, Wages for Housework, Football for feminists, Children in Our Lives, Isis and us, Classism and Racism, Put Your Money Where Your Movement Is, Dealing with the Contradictions in Our Lives, Implications of Feminism in the American Economic System and Men in the movement: Mystique or Mistake?" *See* Nat'l Org. for Women, It's Our Revolution NOW! 8th Annual NOW Conference, 10–13 (Oct. 24–271975), MC 496, Box 21, F. 3, SLRIHUC.

[174] Press Release, Nat'l Org. for Women, The Shame of the Bicentennial (Jan. 6, 1975), MC 496, Carton 200, F.14, SLRIHUC.

[175] *Id.* at 2.

related to the fight for the ERA, which for that very reason, constituted for Smeal "a moral issue" integral to the democratic values of the nation.[176] Notably, the choice Smeal was reclaiming in 1975 through her vindication of the ERA was not, like abortion, abridged by criminalization. Instead, the choice to work inside or outside the home was impaired by social, economic, and legal conditions that needed to be redesigned precisely to positively enable those choices.

In the larger political context, by the mid-1970s, women's legal gains were slowing, and the prospect of a federal ERA was beginning to deflate. What seemed like a certainty by the beginning of the decade was far less secure as years passed, and the rate of states' ratification diminished. Still, the situation seemed by no means insurmountable, and feminists remained optimistic. A 1976 interview with Betty Friedan headlined: "Is the women's movement losing its momentum?"[177] illustrated the times' impasses for feminist hopes. Asked whether she agreed with those who said the recent state ERAs defeats were the result of a lack of connection between the movement and the average woman, Friedan responded that the New York and New Jersey state ERAs defeats were the consequence of a "campaign of lies . . . false propaganda that played into women's fears" as well as a takeover of the movement "by extreme groups."[178] Although New Jersey and New York had ratified the federal ERA in 1972, both failed to do the same in 1975 with their respective state versions, mirroring a broader trend.[179]

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[176] The term "chairone" was used in the press release. *Id.*
[177] Rhoda Anon, Is the women's movement losing its momentum?, The Times Record, Mar. 16, 1976, at 14.
[178] Among those "extremist groups" Friedan counted "[t]hings like Ms. magazine, for instance, which trivialize the movement and give it an image that is alienating, I think, for the majority of women." *Id.*
[179] *See* Jane J. Mansbridge, Why We Lost the ERA 14 (1986).

While the ERA began to rise within the organization's agenda, NOW continued to espouse many causes, among which abortion remained subordinate. In 1977, none of the national conference's resolutions referred specifically to abortion, although the resolution on religion included it among the harms churches had brought upon women. Along with socializing people "into accepting the values of patriarchy with its emphasis on hierarchical authority [and] its imperialistic consciousness," the resolution against religion denounced churches' denial to women of contraceptive information and the "right to make the moral choice of abortion . . . ."[180] Thus, abortion appeared as one more instance of the quest for *feminist freedom,* a battle fought in many arenas. Nevertheless, religion was only one area of concern. The organization had decided towards its second decade to focus instead on "Economic Priority Issues" including collective bargaining, full employment, child care, and guaranteed minimum income, among others.[181] Thus, the ERA appeared as one more site for pursuing the economic freedom NOWers in 1977 deemed crucial.

Fittingly, NOW initiated a national boycott campaign against the unratified states. Activists set to "convince organizations to pass resolutions stating that they will not hold meetings, conferences, or conventions in states which have not ratified the ERA."[182] But if NOW focused on economic issues that did not mean the plenary only considered economic matters. Other resolutions were adopted on issues that went from soliciting amnesty for all war resisters to

[180] Nat'l Org. for Women, National Annual Conference "The Future is NOW: On to the Second Decade" 53–54 (1977), MC 496, Box 21, F. 4).
[181] *Id.* at 50–51
[182] Nat'l Org. for Women Economic Boycott Campaign for the ERA kit (Jan. 16, 1978), MC 496, Carton 177, F.47, SLRIHUC, (sent to all NOW Chapters and State Activists).

demanding "that the churches of the United States undertake reparations programs in recognition of the great wrongs they have done in oppressing women and other victims of patriarchy."[183]

In 1978, NOW's National Board called for a "State of Emergency" to convince Congress to extend the deadline for the ERA ratification, unambiguously committing to the amendment as the organization's highest priority.[184] That same year, five years after *Roe* and for the first time, NOW invited supporters to join an "anniversary of the Supreme Court decision to legalize abortion" march.[185] Even then, the "Texas case" was not yet unambiguously *Roe.* NOW did not refer to the decision in its newsletters as *Roe v. Wade* until the decision's tenth anniversary.[186]

However, by the end of the 1970s, NOW's attention to abortion had decisively increased, though it continued to be the "Texas case." On *Roe*'s anniversary in 1979, NOW sent telegrams "to all major organizations on both sides of the abortion issue, inviting leaders to meet to discuss the formation of a comprehensive reproductive health program."[187] NOW was concerned with the increasing polarization around abortion and "fear[ed] . . . that the extreme climate of the crusade against abortion [was] taking on the overtones of a religious war."[188] For *Roe*'s anniversary the following year, recalibrating after the conciliation strategy failed, NOW released a 15-page press packet that included "a factsheet on major legal decisions, public opinion poll trends and legislative

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[183] *See* NOW Records, *supra* note 124.
[184] Press Release, Nat'l Org. for Women, Declaration of a State of Emergency for the Equal Rights Amendment (Mar. 1, 1978), MC 496, Carton 200, F.18, SLRIHUC.
[185] Press Release, N.O.W. Issues Invitation to Marchers MC 496, Carton 200, F.18, SLRIHUC.
[186] Press Release, Statement of Judy Goldsmith, Nat'l Org. for Women President on the Ten-Year Anniversary of the Supreme Court's Decision on Abortion (January 22, 1983) MC 496, Carton 200, F.30, SLRIHUC.
[187] Press Release, Statement by Eleanor Smeal (January 22, 1979), MC 496, Carton 200, F.19, SLRIHUC.
[188] *Id.*at 3.

actions on abortion since the Supreme Court decision in 1973."[189] The package also contained "an analysis of the organizational health of the various groups which make up the anti-abortion lobby and an analysis of their positions in the 1980 elections."[190] NOWers tried different strategies to counter the conservative backlash over abortion, an attack that had grown during recent years but had been present since before *Roe* was decided. So, while dedication to abortion had increased, *Roe* continued to be the generic Supreme Court case, and abortion had not attained center stage. Outside NOW, the broader milieu of fellow activists and groups that had struggled for *feminist freedom* had dramatically thinned as most initiatives had either dissolved or significantly diminished.[191]

4. Roe Feminism

ERA: The First Single-issue

The single issue that concentrated NOW's energies in the early 1980s was the ratification of the ERA. Until then, the organization had always addressed multiple issues, loosely prioritizing some but never really committing to a forefront one. For a consolidated organization to so drastically change course and forego embedded practices, several pieces needed to come into

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[189] NOW Records, Editors and Reporters: Abortion Rights -Who's winning; Who's losing?, 1979, MC 496, Carton 200, F.20, SLRIHUC.
[190] *Id.*
[191] For instance, the Combahee River Collective an emblematic Black lesbian feminist collective was active between 1974 and 1980. See *The Struggle*, Combahee River Collective, https://combaheerivercollective.weebly.com/history.html [https://perma.cc/D349-U546]. The National Welfare Rights Organization was active until March, 1975, when the organization "declared bankruptcy and closed its doors." *See* Premilla Nadasen, Welfare Warriors: The Welfare Rights Movement in the United States, 224, (2005). The New York Wages for Housework group was active between 1973 and 1977. See Silvia Federici, Wages for Housework, 11 (2017).

place. In part, the unprecedented rise of the ERA was a response to external factors, namely, a growing politically hostile scenario and ratification's ticking clock.[192] The original deadline passed in 1979 and Congress—after intense and successful feminist pressure—had granted a three-year extension, but in 1980 no new states had ratified the amendment (none would) and time was running out.[193] In the broader political landscape, feminists' opportunities had significantly worsened. Even before Reagan's landslide victory, it had become clear that the "nationwide consciousness" about women's oppression Betty Friedan had enthusiastically saluted in 1969 was long gone. That year, the Republican Party withdrew its explicit support for the ERA, which had been first introduced in Congress in 1923 by two Republicans and incorporated into the party platform in 1940.[194] In 1980, instead, the Party "acknowledge[d] the legitimate efforts of those who support or oppose ratification of the Equal Rights Amendment."[195] Moreover, for the first time, the party's platform unequivocally opposed abortion by committing to support a

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[192] Whereas both factors could be described as external insofar as they exceded the organization's dynamics, in reality, the growing political hostility was not truly external as the new-found alliance of neoliberals and conservatives that consolidated in this period had been born precisely as a response to 1960s activism and its questioning of socio-economic structures. *See* Melinda Cooper, Family values: between neoliberalism and the new social conservatism, 1-66, (2017).

[193] Jane J. Mansbridge, Why We Lost the ERA, 13, 184, (1986).

[194] The first ERA was introduced in Congress by Kansas Republicans Anthony Daniel Read, Jr. (House) and Charles Kurtis (Senate). The Amendment had been drafted, and intensely lobbied in favor of, by Alice Paul, from the National Woman's Party. S.J. Res. 21, 68th Cong. (1923); Alice Kessler-Harris, In pursuit of equity: women, men, and the quest for economic citizenship in 20th century America, 205 (2001). Also, Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman's Party*, 71 J. Am. Hist. 43 (1984). Although the Republican Party supported women's equality in its 1928 Platform but not the ERA, it would be the first major party to officially endorse the ERA in 1940. *See* Gerhard Peters & John. T. Wooley, *Republican Party Platform of 1928,* Am. Presidency Project, https://www.presidency.ucsb.edu/documents/republican-party-platform-1928 [https://perma.cc/T5SQ-7QKP] (stating that the Republication party "accepts wholeheartedly equality on the part on women"); Gerhard Peters & John T. Wooley, *Republican Party Platform of 1940*, Am. Presidency Project, https://www.presidency.ucsb.edu/documents/republican-party-platform-1940 [https://perma.cc/M6XQ-ZX2F] (stating that the Republican party "favor[s] . . . an amendment to the Constitution providing for the equal rights for men and women").

[195] Gerhard Peters & John T. Wooley, *Republican Party Platform of 1980*, Am. Presidency Project, https://www.presidency.ucsb.edu/documents/republican-party-platform-1980 [https://perma.cc/SE2J-A6CQ].

constitutional amendment that would "restore protection of the right to life of unborn children" as well as backing congressional efforts to limit the use of taxpayer's money in abortions.[196] Just four years earlier, the party's platform dealt with abortion for the first time, tepidly acknowledging that supporters and opposers of abortion coexisted within its lines.[197]

Relatedly, while in the 1970s Democrat and Republican legislators were barely divided over abortion, by the late 1980s the issue had become tremendously polarized.[198] Party realignment certainly raised the stakes of the abortion debate in national politics. However, it was not the leading factor for feminists' change of strategy. For one thing, activists had faced vocal "pro-lifers" intense opposition all along. Even before the major parties' realignment, feminist advocates had faced a strong militant opposition, if led by smaller organizations.[199] NOW's shifting emphasis did not tightly align with the changing trends in national politics. Moreover, the organization's priorities had never merely reflected external tendencies. The organization's inner dynamics were indispensable drivers of this transformation. External factors alone were not sufficient for NOW's drastic departure from its historically multiple practices.

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[196] *Id.*

[197] In 1976, the Republican Party Platform held: "There are those in our Party who favor complete support for the Supreme Court decision which permits abortion on demand. There are others who share sincere convictions that the Supreme Court's decision must be changed by a constitutional amendment prohibiting all abortions. Others have yet to take a position, or they have assumed a stance somewhere in between polar positions." Note that the "Texas case" (how the *Times* initially referred to *Roe v. Wade)* was here too referred as the generic Supreme Court abortion decision. Gerhard Peters & John T. Wooley, *Republican Party Platform of 1980*, Am. Presidency Project, https://www.presidency.ucsb.edu/documents/republican-party-platform-1976 [https://perma.cc/7AQM-R67R].

[198] In 1974 both Democrats and Republicans in the Senate voted in favor of diminishing abortion restrictions around 40% of the time; through the 1980s, that number would oscillate around 70% for Democrats and 20% for Republicans. The polarization was not as stark in the House but still rose as time passed. The split in Congress continued to grow in the following years. By 1994, over 80% of Democrats were voting "pro-choice," while the same percentage of Republicans was voting "pro-life." Greg D. Adams, *Abortion: Evidence of an Issue Evolution*, 41 Am. J. Polit. Sci. 718, 723-725 (1997).

[199] *See* Karrer, *supra* note 169.

For this to be possible, activists needed to find an issue malleable enough so as to credibly condense their manifold aspirations. For NOW to adopt a single-issue approach, it needed to be not-so-single and able to fit a panoply of demands. The amendment was uniquely situated to spearhead—and make possible—NOW's new strategy for three important reasons. First, the ERA was historically very significant as it represented early twentieth-century feminists' unfinished fight for freedom. The first version had been introduced a few years after the ratification of the nineteenth amendment.[200] This time around though, the ERA coalition had overcome past historical divisions between feminists of equality and difference—the former pushing for formal equality and the latter fighting to secure vulnerable women's protection by emphasizing their difference—uniting both factions to rally around a dual strategy (that included ratifying the 1972 ERA).[201] Second, In part for the first reason, the ERA was a particularly significant issue for the organization from early on, and, even before external pressure accumulated, the ERA had been among NOW's priorities. Third, the amendment was malleable enough that it could fit demands from widely diverse areas, making the transition to a single issue particularly palatable for activists' legal imagination. More than an issue, the ERA was seen as an entrance point to different sets of preoccupations, which could vary through time. Its general mandate prescribed that "equality of rights under the law shall not be denied or abridged . . . on account of sex"[202] for

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[200] *See* Mansbridge, chapter 2, *supra*, note 193.
[201] This in the context of the Lochner Era in which many "feminists of difference" opted for a protectionist agenda hoping to secure whatever labor protections they could win in the hopes of then extending them to their male coworkers. For an account of the history of the ERA campaigns and the successful unification of both sectors under the dual strategy that included fighting for the ratification of the 1972 amendment and litigating to push for a judicial interpretation of the fourteenth amendment that furthered its protection on account of sex, see Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 Calif. L. Rev. (2004).
[202] Equal Rights Amendment, H.R.J. Res. 208, 92d Cong. § 1 (1972).

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

Thus, when NOW LDEF commissioned its vice president, Jane Trahey, to develop a five-year plan for the organization in 1980, it is not surprising that she reported she had "become convinced that the most important part . . . of [organizational] planning is the examination and clarification of organizational purpose, goal and program strategy" and that she was "convinced that the ERA is central to anything NOW LDEF is and does."[203] That is not to say that the ERA instantly became everything, but its centrality definitely rearranged NOW's agenda, which from then on was articulated in the function of the amendment.[204] NOW's multiple task forces and area groups increasingly dedicated their energies to ERA efforts.[205] As the ticking clock precipitated, the ERA's rise reflected a strategic, as much as substantive, shift within the organization.

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[203] *See* Memorandum of a Five-Year Plan from Jane Trahey to Exec. Comm. and All Bd. Members of Nat'l Org. for Women Leg. Def. and Ed. Fund (1980) (sharing the organization's outlook and emphasizing the importance of the ERA for the cause of the organization)Jane Trahey was co-Vice President of the NOW LDEF Board of Directors (along with Gene Boyer and Sandra Jenkins). See NOW LDEF Records, Memo to Executive Committee and All Board Members/From: Jane Trahey/Re: A 5-Year Plan, 1980, MC 623, Box 34, F.10, SLRIHUC.

[204] In 1980 NOW LDEF declared priorities included the ERA impact project and litigation in "employment discrimination, educational equity, family issues and the proposed ERA." NOW-LDEF Proposal for Student Training Proposal, (1980) (analyzing the document for Student Training, it is reasonable to hypothesize that, at the time, many of the organization's priorities could be traced back to the ERA), MC 623, Box 95, F. 2, SLRIHUC. All of its priorities could be retraced to the Amendment. NOW LDEF Records, Recent Priorities for the NOW LDEF Program/Proposal for Student Training Project, 5-6, 1980, MC 623, Box 95, F. 2, SLRIHUC.

[205] In the organization's annual conferences, the ERA increasingly gained terrain as the foremost issue. Many rights related to the constitutional amendment figured in the organization's discussions. This multiplicity is reflected in NOW's national conferences. *See* NOW, National Annual Conferences, (1973–1984) (illustrating this recurring theme over the span of more than a decade) MC 496, Box 21, F. 1–12), SLRIHUC.

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

To be sure, feminists had deployed the law all along *feminist freedom*, pressing and adapting it to produce the myriad of institutions they built during that period. But the ERA was not that. It was an abstract promise of constitutional equality whose substance would have to be filled in time by feminists' concrete aspirations. By compromising on a rule that could fit within the standards of national politics, women from Alabama to Wyoming would be able to claim their legal equality with a democratically backed constitutional basis. For activists, this meant that even in a hostile scenario of worsening economic conditions and decreasing popular sympathy, they could secure a substantial legal gain at the national level. This gain, they hoped, would enable further conquests of economic freedom. So, as the smaller efforts died out, the larger national organizations coalesced in backing the constitutional amendment that would aspirationally bring part of the 1970s *feminist freedom* into the United States' highest law.[206] Feminist hopes were, thus, largely

[206] By 1978, 82 associations had pledged to boycott states that had failed to ratify the ERA. A few notable within those included were the: Church Women United, Coalition of Labor Union Women, Council of Nurse Researchers of the American Nurses' Association, Federally Employed Women, Feminist Law Students Association (University of Santa Clara), Leadership Conference of Women and Religion, League of Women Voters, National Assembly of Women Religious, National Association of Social Workers, National Conference of Puerto Rican Women, National

pinned on constitutional reform. The amendment, activists thought, would consolidate a decade of transformation and symbolically entrench the nation's commitment to gender equality; while its open texture meant that its precise reach would only be determined in the future, through its application. Further, by vesting Congress with the power to enforce the amendment, many hoped a new relation between the Federal government and the states could be pressed so the former could come to the rescue to secure and expand the scope of the ERA's protections.

Thus, when the amendment was finally defeated in 1982[207] (for a time, at least), it dashed even modest feminist hopes of bringing women into the (moderately transformed) mainstream while the more sweeping and multiple feminist institutions of the quest for *feminist freedom* continued their retreat. By the time the ERA's extended deadline ran out, the myriad of feminist politics and projects that had proliferated earlier in the decade had shrunk to fit abstract women's rights ideals. The capacious visions of rights and freedom activists had pushed forward—through daycare projects, employment fights, self-help health centers, and reclaiming women's image—moved to the backseat. [208]

When the ERA failed, NOW never truly resumed its far-reaching agenda, and the new issue that steadily rose to occupy the void left by the ERA was abortion, paradigmatically personified in *Roe*. Devoid of both the breadth of the bottom-up local initiatives that strove to re-imagine

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Federation of Business and Professional Women's Clubs, National Woman's Party, National Women's Political Caucus, Political Action Committee of American Nurses' Association, Society of Women Engineers, United Auto Workers, Women's Caucus of National Legal Aid & Defender Association, Women in Communications, Women's Equity Action League, Women's Lobby and Women's Ordination Conference (Catholic). Press Release, Economic Boycott Campaign for the ERA, Nat'l Org. for Women, (1978), MC 623, Carton 177, F.47, SLRIHUC.

[207] Jane J. Mansbridge, Why We Lost the ERA, 13, (1986).

[208] For more information, see *supra* note 101–103.

women's position in society and the broader reach of the top-down abstract institutionalization of gender equality in the Constitution, abortion seemed to be all that remained for feminist activists to reclaim. Feminists, in part, responded to a changing political landscape by reorganizing their priorities to maximize their chances of success in an ever-steeper ascent. Yet, conservative backlash alone was not the reason why abortion gained prominence; it had been a constant (if through changing conservative alliances) since before *Roe*.[209] Moreover, even as intense conservative backlash against abortion consolidated in 1980, NOW decidedly prioritized the ERA instead.

A New Single-issue: Judicially Enforceable Abortion Rights

A year after the extended deadline for the ERA had run out—in 1983—activists commemorated *Roe v. Wade*'s tenth anniversary.[210] For the first time, the decision would be remembered as more than the abortion case. This time, it was simply referred to as *Roe v. Wade*.[211] The once "Texas case" seemed to offer a window of hope, a possible place to articulate the remaining energies and focus feminist efforts to secure another freedom—or prevent its future

[209] *See* Robert N. Karrer, *The Pro-Life Movement and Its First Years under "Roe"*, 122 Am. Cath. Stud. 47 (2011) (analyzing growing coalition of conservative resistance to feminist activism)For an analysis of the growing coalition of conservative resistance to feminist activism see ; Mary Ziegler, Dollars For Life: The Anti-Abortion Movement and The Fall of The Republican Establishment (2022) (overviewing the changing landscape in relation to abortion opponents); *See* Cooper, supra note 193 (accounting the roots of the conservative project that rose during this period tying together economic neoliberalism and moral conservatism).

[210] Press Release, Statement of Judy Goldsmith, National NOW President on the Ten-Year Anniversary of the Supreme Court's Decision on Abortion, Nat'l Org. for Women (Jan. 22, 1983) ("The National Organization for Women, on this, the tenth anniversary of Roe v. Wade, reaffirms the right of women to manage their reproductive lives, without government interference and without coercion."), MC 496, Box 200, F.30, SLRIHUC.

[211] *Id.*; NOW Legal Defense and Education Fund 6, Annual Report, Nat'l Org. for Women (1983) MC 623, Box 348, F.12, SLRIHUC.

erosion. *Roe* would come to occupy the void produced when the organization assumed a single-issue strategy but was then bereft of an issue when the ERA failed.

The early history of NOW and other feminist groups shows that while choice and abortion were part of feminist demands from the beginning, they were by no means the extent of the conversation and were not understood in binary terms. As the previous sections showed, when feminists were concerned with abortion during the early 1970s, it represented much more than decriminalization.[212] A sign held by an activist at an August 1972 town meeting in Lake Placid eloquently summarized: "We're not pro-appendectomy, pro-tonsillectomy or pro-abortion. We're for a free choice."[213] Remarkably, freedom complemented choice. Freedom of choice was indeed

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[212] Much more because it challenged the structural sexual imbalance of power, it was one strike (among many) at the *status quo*. Collective self-education and empowerment was another major component of feminist activism in relation to abortion. For example, in 1971 the N.Y. Women's Health and Abortion Project crafted and distributed a booklet titled "A Short Reading List for Women Who Want to Talk to Each Other About Their Bodies and Their Health." The booklet was intended to offer women a guiding route to start a health self-education group. "Any woman can organize a series of discussions about women's sexual and reproductive systems" the introduction began, inviting women to take charge of their own bodies and health collectively in discussion. Although the booklet contained a reading list, resources that could without much ado be taken as a personal bibliography, the purpose of the collection was explicitly to open discussion, to join women to uncover their bodies and their health. Recognizing women already knew plenty, the introduction argued, they are largely unable to access said knowledge as "it is buried in a haphazard collection of private experiences." Thus, the solution was to "get together and pool knowledge and experience." As a way out of individual's blindness, collective experience would offer a route. Moreover, the process would empower women to fight back against the pressures that affected their lives. In words of the reading lists' authors "it's important that we do this; choices such as what form of birth control to use, how to choose a doctor, where to get an abortion can no longer be treated as purely personal matters, there are too many other interests -drug companies, population controllers, health planners, that are already making decisions about us and our lives." Thus, to be able to decide "what we need and what we want" women needed to get together and foster their shared knowledge. Against social and market pressures, the project offered, women's freedom. N.Y. Women's Health & Abortion Project *See* Jaqueline Bernard Papers, A Short Reading List for Women Who Want to Talk to Each other About Their Bodies and Their Health", N.Y. Women's Health & Abortion Project, Jacqueline Bernard Papers, (1971), MC 543, Box 20, F.8, SLRIHUC.

[213] "Free-choice" activists had presumptively gathered in one of Governor Rockefellers' town meetings in response to the increasing presence of anti-abortion activists throughout his series of town meetings. *See* Maurice Caroll, *Pro-Abortionists Greet Governor: Attend Town Meetings in Bid to Counter Opposition*, The New York Times, Nov. 23, 1972, http://timesmachine.nytimes.comhttp://timesmachine.nytimes.com/timesmachine/1972/11/23/93420671.html?pageNumber=17 (last visited Feb 3, 2023).

part of the conversation in the early 1970s but did not monopolize it. To the extent that choice was part of the debate, the primary term was freedom more than choice. As uttered by feminists, in its very syntax, freedom was more encompassing than choice as it allowed for an overarching redefinition of one's conditions and circumstances, whereas the later predilection for choice presupposed that the alternatives were somewhat predetermined.

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

During the 1970s, NOW LDEF's participation in abortion litigation was virtually inexistent. In 1973, NOW LDEF (NOW's branch dedicated to litigation and education that separated into a new entity for tax purposes) participated in nine court cases, none of which pertained to abortion.[214] In 1974, as presented by NOW LDEF, "[s]ome of the major issues included equal pay, discrimination in higher education, the constitutionality of benign preference, and the right to disability payments for pregnancy or pregnancy-related illness."[215] The two most significant cases of that year were *Johnson v. University of Pittsburgh* and *Cussler v. University of Maryland*. According to the report, they were "landmark Title VII lawsuits, filed in support of the Fund's

[214] At that point, NOW LDEF's could only participate in litigation through *amicus curiae* briefs and "minor financial support" as it did not have enough funds to "open a litigation office and hire staff attorneys." *See* Nat'l Org. For Women Legal Def. and Educ. Fund, Annual Report 1973 1 (1973), NOW LDEF Papers, MC 623, Box 348, F.8, SLRIHUC. For NOW LDEF's origin and role see *supra* notes 102, 104, and 105.
[215] Natl' Org. for Women Legal Def. and Educ. Fund, Annual Report 1974 5 (1974), MC 623, Box 348, F.8, SLRIHUC.

belief in the importance of opening higher as well as lower education positions to women on an equal basis with men."[216] Out of the ten cases the report mentioned, only one concerned abortion (*Westby v. Doe*, a challenge to the denial of Medicaid payments for abortion).[217]

In 1975, NOW LDEF's primary focus continued to be the *Johnson* case, and abortion was altogether absent from the fund's priorities.[218] NOW LDEF's annual report understood its featured litigation (the Johnson case) to be a "sex-discrimination suit with far reaching implications for the position of women in academia and the work-world."[219] The plaintiff, Sharon Johnson (a biochemistry professor), sued the University of Pittsburg after it denied her tenure "while two male professors with lesser qualifications" obtained tenure that year.[220] NOW LDEF's report also featured three cases as "litigation of special importance:" one on the custody rights of a lesbian mother, one on labor discrimination of federal employees, and one on pension discrimination on account of sex.[221]

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[216] *Id.*
[217] *Id.*
[218] Nat'l Org. for Women Legal Def. and Educ. Fund, Annual Report 1975 6 (1975) MC 623, Box 348, F.8, SLRIHUC.
[219] *Id.*
[220] It was the first case in which the organization directly represented a plaintiff. Nat'l Org. for Women Legal Def. and Educ. Fund., 1975 Annual Report (1975), MC 623, Box 348, F. 8, SLRIHUC. The representation was assumed for no fee by Sylvia Roberts, NOW LDEF's general counsel and only attorney at the time. *See* Nat'l Org. for Women Legal Def. and Educ. Fund, 1974 Annual Report 1 (1974), MC 623, Box 348, F. 8, SLRIHUC. She remained as the only full-time attorney until 1977 when Phyllis N. Segal joined the staff as legal director. *See* Nat'l Org. for Women Legal Def. and Educ. Fund, 1977 Annual Report 1 (1977), MC 623, Box 348, F. 8, SLRIHUC. By 1980 the fund had two staff attorneys (Susan K. Blumenthal and Judy Avner) and one Law Clerk (Kim Greene)., *See* Nat'l Org. for Women Legal Def. and Educ. Fund, 1980 Annual Report 14 (1980), MC 623, Box 348, F. 10, SLRIHUC; Stephanie Clohesy & Jane Trahey, Memo, (1980), MC 623, Box 34, F. 10, SLRIHUC.
[221] *See* Nat'l Org. for Women Legal Def. and Educ. Fund, 1975 Annual Report 7 (1975), MC 623, Box 384, F. 8, SLRIHUC.

NOW LDEF's heavy investment "in the Sharon Johnson case," believing that "this case can open historic doors for professional women in the same way Robert's Southern Bell Telephone case opened doors for blue-collar women,"[222] once again signaled how the fates of blue- and white-collar female workers appeared to be fundamentally connected in the eyes of NOW. What mattered was that at least some women attained key positions as "[a]ll women will benefit when some women attain decision-making positions in business, education, and public service."[223] While many of the campaigns and efforts the organization had pushed in its first decade consisted mainly of expanding the decision-making possibilities of all women, as conditions changed, their efforts began to focus more on some women (not coincidentally, white-collar women).

The caseload pattern continued throughout the decade, and until 1979, neither abortion nor reproductive rights in general, appeared as an organizational priority. In fact, between 1976 and 1979, NOW LDEF barely participated (as an *amici*) in one abortion case (in 1976) and even that case was not designated as a priority in any way.[224]

When the ERA's ratification failed, feminists' strategies came to rest increasingly on abortion, and, in turn, abortion came to be conceived of primarily as a judicially enforceable right to choose. This can be readily seen in how NOW LDEF's focus on litigation began to increase. While during the early 1980s NOW had focused its resources on the Project on Equal Education Rights (PEER), which represented NOW LDEF's highest expenditures (adjusted to November 2022 USD) in 1981

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[222] *Id.* at 6.
[223] *Id.*
[224] *See generally* McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976).

and 1983, as the decade progressed, more resources were dedicated to litigation (see Figure 2). In parallel, by 1980, the myriad of feminist projects—health centers, magazines, consciousness-raising groups, communes, popular daycares, art centers, and bookstores—that had extended all across the country had drastically diminished.[225]

Courts' reputation as productive venues to pursue social change was a necessary condition for NOW's turn to litigation, but the timing by which the turn took place cannot be explained by the courts' good name (amongst social reformers) alone. Common sense attributed a significant portion of the Civil Rights Movement's victories to successful litigation.[226] The Warren Court's shadow still lingered strongly among progressives and gave activists hope for the possibilities of the judicial strategy. But courts had become attractive for social progressives earlier, increasingly in the 1960s, and with force in the early 1970s, but NOW did not decidedly turn to them then.[227] While litigation had always been a part of NOW's agenda, until the 1980s it had remained secondary as compared to NOW LDEF's other projects.

During the mid-1980s, abortion increasingly gained importance, but its character as an organizational priority was far from clear. In 1980, for the first time, reproductive freedom

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[225] Spain, *Constructive Feminism*., at 38.

[226] This was not necessarily the case, for an account over how the significance of the judicial role over civil rights has been overestimated see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change? Second Edition* (Chicago, 2008); Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis," *The Journal of American History* 81, no. 1 (1994): 81–118, https://doi.org/10.2307/2080994.

[227] In 1975, Harvard Law Review published what would become a seminal work on the transformation of litigation and justice's role within it. Chayes argued that litigation had transited from a traditional model of adjudication in which justices were concerned with specific parties and their past conducts, to a public law litigation model in which decisions were "not a dispute between private individuals about private rights, but a grievance about the operation of public policy." Chayes was not implying that disputes were not presented in terms of rights to the court but that their resolution pertained a policy decision, more than the adjudication of rights with respect to a past conduct. *See* Abram Chayes, "The Role of the Judge in Public Law Litigation," *Harv. L. Rev.* 89 (1976 1975): 1281.

appeared among NOW LDEF's litigation priorities.[228] That year, it featured alongside the ERA Impact Project, family law, employment, and education equity only to disappear from the picture again in 1981 (otherwise, that year's priorities were the same as the previous).[229] The years that followed intermittently included reproductive rights among its concerns.[230] Only in the late 1980s, did abortion and reproductive rights finally become prominent.[231] The first year that litigation expenditures surpassed those of the other substantial programs (namely PEER and education), NOW LDEF's Executive Director continued to represent the organization's purpose as a broad agenda in which litigation played no particular role. On her reading, the United States had by 1984 "reached the point where *quality* is impossible without *equality*" and NOW LDEF was working in

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[228] Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 10 (1980), MC 623, Box 348, F.10, SLRIHUC.

[229] Nat'l Org. of Women, NOW Legal Defense and Action Fund Annual Report 11–12 (1981), MC 623, Box 348, F.11, SLRIHUC.

[230] [230] Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 10 (1980), MC 623, Box 348, F.10, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 11–12 (1981), MC 623, Box 348, F.11, SLRIHUC; NOW Legal Defense and Action Fund Annual Report 12 (1982) MC 623, Box 348, F.12, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 6 (1983–84), MC 623, Box 348, F.12, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 13–18 (1985) MC 623, Box 348, F.12, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 7 (1988), MC 623, Box 348, F.13, SLRIHUC.

[231] The Report for the years 1983–1984 under the heading "Law Reform" celebrated the fund's "active participation in precedent-setting legal cases promoting women's equality in education, employment, family law and reproductive freedom, as well as constitutional and civil rights." That the title of the section of litigation was "Law Reform" hints at the larger strategic shift the organization was beginning to dive into. The 1985 Report did not mention abortion or reproductive rights, but featured a special historic edition celebrating "fifteen years of achievement." The historic edition included a timeline with NOW's litigation highlights since 1967. Though the timeline featured events for each year, the first mention of abortion was in a 1982 highlight ("assumes co-counsel role in *American College of Obstetrics and Gynecology v. Thornburgh* challenging Pennsylvania's Abortion Control Act"). The other mention came in 1983 and included reproductive rights for the first time as a category (with two cases). In 1984, there were again no reproductive cases (out of ten that were mentioned in addition to other projects). The NOW LDEF collection has no records of the 1986 and 1987 reports. However, in 1987, NOW issued an extensive report on reproductive rights to be disseminated in the form of a booklet, addressing the "major issues before Congress affecting abortion and birth control rights" for the first time. *See Major Issues Before Congress Affecting Abortion and Birth Control Rights*, NOW Rep. on Reprod. Rights (Nat'l Org. for Women, New York, N.Y.) 1987, MC 496, Carton 210, F.63, SLRIHUC.

the economy, education, and the family to turn things around by providing "the missing pieces in the array of solutions to America's pressing problems."[232]

In 1988, NOW LDEF dedicated its report in a special edition "to the Class of 2000," who were first graders at the time. That year's priorities, as declared in the report, were equal employment law, family law, and economic supports, including insurance and pensions.[233] Still, even in a year with a marked commitment to economic redress, a case count of the litigation docket of the report reveals that abortion was third in importance, following employment and family law cases.[234]

As abortion rose within the organization's litigation docket, litigation as a strategy gained importance within LDEF's actions. While during the 1970s litigation had been relatively unimportant for NOW's LDEF (which had invested most of its resources in education campaigns), that situation changed through the mid-1980s and by 1990 had completely reversed. As Figure 2 shows, until 1979 most of NOW LDEF's budget was spent on education, initially on Education and Public Information in general and then on PEER. Two years after the ERA deadline ran out in 1984, LDEF made its highest expenditure in litigation of the period —adjusted by inflation— ($626,192, the equivalent of $1,770,410.7 November 2022 USD), for the first time surpassing other areas. The peak was closely followed by 1990 ($779,624, equivalent to $1,734,698.36

[232] Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 13 (1983–84) (emphasis original) MC 623, Box 348, F.12, SLRIHUC.
[233] Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report 4 (1988), MC 623, Box 348, F.13, SLRIHUC.
[234] The total case count, using the report's criteria is as follows: employment 17 cases, reproductive rights 8 cases, economic supports for women, insurance and pensions 4, Family Law 12, discriminatory business clubs 2, First Amendment Rights 1. The count could be easily further divided as out of the 17 cases classified under employment, 3 pertained affirmative action, 4 sexual harassment, 2 pregnancy discrimination and the rest involved discrimination in hiring/promoting/payment the scope of Title VII and maternity leave. Conversely, 7 out of the 8 reproductive rights cases were abortion cases. *Id*.

November 2022 USD), in which, as a percentage of the total expenses, litigation more than doubled any other service.

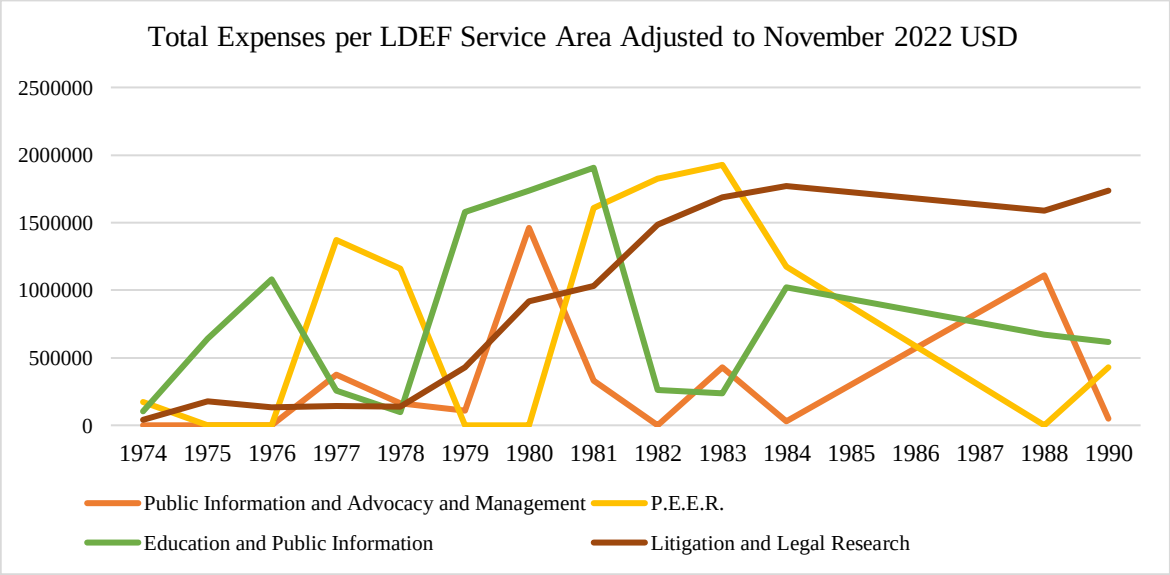

Figure 2. The graph was elaborated by the author with data from the Annual Reports of the Legal Defense and Education Fund of NOW and the inflation data of the US Bureau Of Labor Statistics (https://www.bls.gov).[235]

6. Choice: Feminists' New Legal Horizon

[235] U.S. Bureau of Labor Statistics, https://www.bls.gov [perma]; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1973), MC 623, Box 348, F.8, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1974), MC 623, Box 348, F.8, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1975), MC 623, Box 348, F.8, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1976) MC 623, Box 348, F.8, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1977), MC 623, Box 348, F.8, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1978), MC 623, Box 348, F.9, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1979), MC 623, Box 348, F.10, SLRIHUC; NOW Legal Defense and Action Fund Annual Report (1980), MC 623, Box 348, F.10, SLRIHUC; NOW Legal Defense and Action Fund Annual Report (1981), MC 623, Box 348, F.11, SLRIHUCNOW Legal Defense and Action Fund Annual Report (1982), MC 623, Box 348, F.12, SLRIHUC; NOW Legal Defense and Action Fund Annual Report (1983-1984), MC 623, Box 348, F.12, SLRIHUC; NOW Legal Defense and Action Fund Annual Report (1985), MC 623, Box 348, F.12, SLRIHUC; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1988), MC 623, Box 348, F.13, SLRIHUC; NOW Legal Defense and Action Fund Annual Report (1990), MC 623, Box 348, F.13, SLRIHUC.

Even after the extended ratification deadline ran out, the ERA continued to haunt NOW's legal imaginary until abortion definitively took over. In 1988, the organization had decided to launch a new ERA campaign, conscious that the process to ratification would be a long one ("we know that [to pass the ERA] we need to work in the elections of '88, '90, '92, '94, '96 -- however long it takes"[236]), as then-President Molly Yard conveyed to her national audience. But the campaign never kicked off and instead of a march to launch the new ERA campaign, NOW led the "March for Women's Equality/Women's Lives" that year after the "Reagan/Bush Administration moved to urge the Justice Department . . . to take up *Webster v. Reproductive Health Services* for the purpose of overturning *Roe v. Wade*."[237] That is, as NOWers sought to return to the single issue that first filled its agenda, they ended up dedicating those efforts to a new single issue instead: abortion.

In 1989, Yard's welcome to NOW members attending the National Conference urged them to "build a political army" as they couldn't depend "on the courts" nor "Congress" nor "most state legislatures"[238] to defend abortion. The issue of the upcoming elections would be "the right of a woman to choose when and if to bear children, the right not to be forced to compulsory pregnancy because birth control fails."[239] Yard reacted to the Reagan/Bush attack by opening the venues through which feminists would fight for abortion. In refusing to be confined or dependent on courts or legislatures—aspiring for a political army instead to fight the war—NOWers inadvertently

[236] Nat'l Org. for Women, The 1988 Conference Program Book 1, MC 496, Box 21, F.15, SLRIHUC.
[237] Nat'l Org. for Women, The 1989 Conference Program Book 2, MC 496, Box 21, F.16, SLRIHUC.
[238] *Id*.
[239] *Id.*

assumed the terms of that war were those of choice. As Yard declared: "[w]e are in a war -- a war for freedom for women. Just as we must have ERA in the Constitution to guarantee equality of rights, so we must win the right for all time to abortion. The very freedom of our lives depends on this,"[240] she inadvertently conceded the scope of women's freedom was now that of their right to choose. In linking abortion to the ERA, assuming the former to be the righteous continuator of the latter, she situated women's fight for freedom within a new framework.

By 1990, abortion appeared in NOW presidents' speeches as prominently as the other bread-and-butter issues that had taken the organizations' attention for so long.[241] The next year, Yard would again include abortion in her brief opening remarks included in the conference's booklet (in relation to the Freedom of Choice Act of 1991).[242] Whereas NOW's President presented the 1989 shift towards Women's Lives in part as a necessary reaction to the executive's actions ("gone were our plans"),[243] the same caveat did not follow her 1990 nor her 1991 addresses.[244] Yet, in all three addresses, abortion figured prominently among NOW's preoccupations. Inadvertently, like Yard, NOW had come to espouse abortion as a central concern and precisely on the terms that its judicial trajectory had set, not merely as a reaction but as a matter of principle. Freedom was

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[240] *Id.*
[241] Molly Yard's welcomed NOW's membership to the organization's National Conference by remarking "[a]nother year has passed since our last Conference and we are still waiting for child care, medical leave, pay equity legislation in Congress" and immediately followed with "[a]nd we await again for a Supreme Court decision on abortion rights" implicitly positioning abortion and everything else (legislation proposals) at the same level. Nat'l Org. for Women, The 1990 Conference Program Book MC 496, Box 21, F.17. SLRIHUC.
[242] Nat'l Org. for Women, The 1991 Conference Program Book 1 MC 496, Box 21, F.18, SLRIHUC.
[243] Nat'l Org. for Women, The 1989 Conference Program Book 2, *supra* note 239.
[244] Nat'l Org. for Women, The 1990 Conference Program Book 1, *supra* note 243, at 1; The 1991 Conference Program Book 1, *supra* note 244, at 1.

choice. By 1991, chapters could order NOW chocolate logos (in mint, milk, and white chocolate) to sell "for women's lives."[245]

Reproductive rights and abortion would define the early 1990s, not just as intermittent sideshows but as the central struggle of NOW both in litigation and broader advocacy.[246] Figure 3 shows the number of cases as listed in the 1990 NOW LDEF Report, by subject.[247] Reproductive Rights was the category with the highest number of cases (20), closely followed by Employment Discrimination (18) and further below Domestic Violence (8).

[245] Order Form to Sell Chocolate for Women's Lives, NOW, MC 496, Box 21, F.18, SLRIHUC. "Your chapter can reap the benefits of activists eating by selling . . . [c]hocolate for Women's Lives." *Id*.

[246] Not only did the number of abortion cases remain high, also, featured news, articles and space was given to abortion. *See e.g*., Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1988), *supra* note 237; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1990), *supra* note 237; Nat'l Org. for Women, NOW Legal Defense and Action Fund Annual Report (1993), MC 623, Box 348, F. 13, SLRIHUC; NOW, The 1988 Conference Program Book, *supra* note 238; Nat'l Org. for Women, The 1989 National Conference Program Book *supra* note 243; Nat'l Org. for Women, The 1990 National Conference Program Book, *supra* note 243; Nat'l Org. for Women, The 1991 National Conference Program Book, *supra* note 244; Nat'l Org. for Women, The 1992 National Conference Program Book, MC 496, Box 21, F. 19, SLRIHUC; NOW, The 1993 National Conference Program Book, MC 496, Box 21, F. 20, SLRIHUC.

[247] The report included in its cover a list of the court cases the organization was involved in, classified by subject area. Because the list included the name of the cases as well as the area under which NOW classified then, those accounted for in two categories (mostly constitutional law and reproductive rights) could be easily spotted. Thus, in the graph I have not included -as the report does- under "constitutional law" the cases that were also included under reproductive rights. Without that adjustment, constitutional cases would be as numerous as reproductive rights one but that figure underestimates the importance of reproductive rights by counting many of the reproductive rights cases also as part of the constitutional law group. See front and back cover of the 1990 report. Nat'l Org. of Women, NOW Legal Defense and Action Fund Annual Report (1990) *supra* note 237.

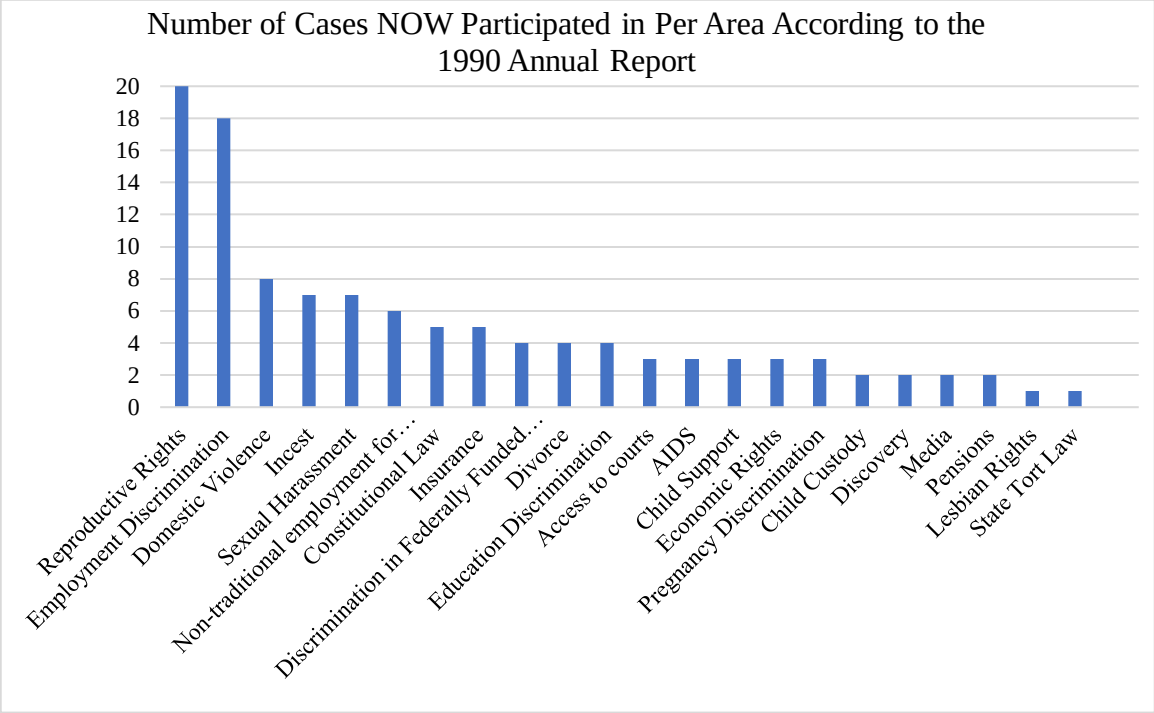

Figure 3. Source: Elaborated with information from the NOW LDEF 1990 Annual Report.[248]

Reproductive rights' protagonism in the caseload appears even more interesting if considered against the funds' declared priority: economic justice. To be sure, economic inequality manifests in abortion access as well, but the booklet did not portray abortion as an economic issue.[249] As

[248] *Id.*

[249] I am not arguing that abortion is *per se* a sexual and non-economic issue, but that at this point activists treated it that way by classifying it as distinct from economic rights. The distinction between economic and sexual injustice is in many respects misleading as it obscures the significant ways in which sexual and economic politics are intertwined. This connection was overtly manifest in activists' earlier actions, throughout what I have referred to as *Feminist Freedom* (in which activists questioned the institutions that relegated women to the roles and spaces society had already defined for them and strove to change them). *See supra* Part I. Were self-health practices better defined as sexual or economic? I would argue both, or neither, inasmuch as the questioning of medical gynecological knowledge and practices, for instance, contemplated both, or something different. The often spurious separation between economic and sexual politics corresponds to that between a politics of redistribution and one of recognition. What sociologist Melinda Cooper wrote on a different context (describing the rise of the New Right, and the alliance of neoliberals and neoconservatives within it) applies to our case as well. *See* Cooper, *supra* note

shown earlier (in Figure 2), in 1990 litigation represented by far the fund's highest expenditure. In it, economic rights cases amounted merely to three. Thus, squaring the report's declaration that "NOW LDEF has always viewed the advancement of economic justice for women as the cornerstone of equality"[250] with the fund's material actions seems problematic. But the translation becomes less challenging once one understands that, in fact, economic justice *had* been the cornerstone of equality for the fund. It just wasn't anymore.[251] In other words, the functional connection between NOW's demands dissolved.

The organization's press release after that year's election stated that "NOW President Molly Yard expressed jubilation at the major victories for women candidates and abortion rights in yesterday's election… She credited the abortion issue with inspiring more women to run for office and more women to vote for abortion rights candidates."[252] By 1990, abortion was not just an issue but a constitutive aspect of women's full participation—if not the full extent of it—for NOW's

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194. She argued that "the distinction between recognition and redistribution proves unhelpful as a way of understanding the actual imbrication of sexual and economic politics" and that "the history of economic formations cannot be prized apart from the operations of gender, race, and sexuality without obscuring the politics of wealth and income distribution itself." Cooper, *Family Values*. Similarly, neither of the demands activists struggled for can be prized from each other nor from the operations of the material context in which they appeared. The demands of the notorious 1970s Women's Strike for Equality elegantly illustrates this point. *See supra* note 70 and accompanying text. Considered together, and not as discrete and independent issues, the demands for abortion, no forced sterilization, free 24-hour daycare, and equal employment and education, embody a transformational agenda concerned with all aspects of society. *Id.*

[250] The report offered an overview of NOW LDEF's "Twenty Years Toward Justice," describing the organization's activities and projects in six areas: workplace issues, economic supports, education, family law, reproductive choice, and court reform. Nat'l Org. for Women Legal Def. and Educ. Fund, 1990 Annual Report 1 (1990), MC 623, Box 348, F. 13, SLRIHUC).

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

[252] Press Release, Nat'l Org. for Women, Molly Yard Jubilant Over Election Results – Despite Obstacles, Women and Abortion Rights Win (Nov. 7, 1990), MC 496, Carton 200, F. 37, SLRIHUC.

imaginary. The other issues that had once populated NOW's legal imagination had left the scene and remained as ancillary demands, disconnected from the core of women's struggle for equal citizenship. The 1990s press releases were significantly more focused on abortion than any other subject.[253]

The turn towards abortion can also be appreciated in the prominent role it attained in NOW's National conference booklets. For its twentieth anniversary conference in 1986, for the first time, the cover of the booklet featured a picture related to abortion: an image of the first March for Women's Lives that had been organized by NOW earlier that year.[254] From that year on, abortion activism would routinely feature in such publications, making it to the cover on numerous occasions.[255] The multi-layered and thematically varied stances that had featured in the

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

[254] Nat'l Org. for Women, The 20th Anniversary National Conference Program Book (1986), MC 496, Box 21, F. 13, SLRIHUC.

[255] Abortion rallies were the sole protagonists of the conferences' covers in 1989, 1990, 1992, 1994, 1995. *See* Nat'l Org. for Women, The 1989 National Conference Program Book, MC 496, Box 200, F. 16, SLRIHUC; Nat'l Org. for Women, The 1990 National Conference Program Book, MC 496, Box 200, F. 17, SLRIHUC; Nat'l Org. for Women, The 1992 National Conference Program Book, MC 496, Box 200, F. 19, SLRIHUC; Nat'l Org. for Women, The 1994 National Conference Program Book, MC 496, Box 200, F. 21; Nat'l Org. for Women, The 1995 National Conference Program Book, MC 496, Box 200, F. 22, SLRIHUC. In 1996 and 1998, they featured in addition to other pictures of the organization's history, predominantly featuring ERA agitation. *See* Nat'l Org. for Women, The 30th Anniversary National Conference Program Book (1996), MC 496, Box 200, F. 23, SLRIHUC; Nat'l Org. for Women, The 1998 National Conference Program Book, MC 496, Box 200, F. 24, SLRIHUC.

organization's previous conferences were thus replaced by abortion, as a matter of rights. The 1989 cover (Figure 4) seemed particularly revealing of the new imaginary: it juxtaposed different international and national news coverage of abortion rallies. The pictures certainly responded to the violent attacks that anti-abortion extremists made against abortion providers.[256] The cover's imagery, super-positioning marches with peaceful protesters supporting abortion, women's lives, and choice, metaphorically confronted anti-abortion violence with peaceful and massive resistance. But the image also conveyed an indirect and more silent transformation: the new meaning of freedom. The different languages of the newspaper clippings represented on the collage hinted that, as seen by the international press, this was America. Even more, activists reclaimed this version of America as peaceful protesters resisting the conservative backlash. Opposing anti-abortion attacks and furthering women's choice was the paramount patriotic move. But the material, cultural, and historical circumstances surrounding that choice were occluded. Under the new focus, long gone were the days of *feminist freedom*. A few months after Reagan had finished his final term in the presidency, NOW's spotlight of choice disputed America's character. If inadvertently, the cover suggested America was (or could be) great again. Its greatness, in turn, depended on the nation's ability to secure the protection of the abstract woman's right to choose.

[256] *See* National Abortion Federation, Violence and Disruption Statistics: A dramatic escalation in hate speech, threats, and violence, 3, (2016), http://prochoice.org/wp-content/uploads/2015-NAF-Violence-Disruption-Stats.pdf [https://perma.cc/YU7Z-764W].

Figure. 4. Cover and back of the NOW's National Conference 1989 booklet.[257]

[257] Records of the NOW, MC 496, Box 21, F. 16, SLRIHUC.

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

Of course, many activists and groups continued to work on issues other than abortion. But the public discussion and main feature of publicly held debates over women's rights and gender roles overwhelmingly turned to abortion rights questions. Feminist organizations' anchor became the right to choose. The more encompassing alternatives, in that scenario, were those concerned not only with the legal availability of abortion but also with its material provision (thus extending the discussion over issues of funding). But even then, abortion and the rights framework remained central. When, in 1990, the National NOW Board decided to "declare a 'State of Emergency,' [. . .] to convince the Senate to reject Souter['s confirmation to the Supreme Court]," what they conveyed was at stake was precisely women's freedom.[258] The significance of this action cannot be overstated. The organization stressed that "NOW has not called a 'State of Emergency' since 1978, when almost all NOW resources were committed to the ERA extension campaign."[259]

[258] Press Release, Nat'l Org. for Women, NOW Declares State of Emergency, Launches Major Lobbying Drive and Demonstration to Stop Souter (Sept. 18, 1990), MC 496, Carton 200, F. 37, SLRIHUC.
[259] *Id.*

Beneath Souter's confirmation pended women's rights, and while Yard warned generally that "abortion rights, equal protection and even the right to birth control [were] at stake"[260] the discussion and actions NOW led (the protest and lobbying in "Do or Die Day")[261] revolved around abortion alone.

The ERA's defeat and feminists' newfound single-issue strategy led to a condensation of what had been the women's movement's demands for *feminist freedom* into the paradigmatic (and single) demand for legal abortion. As the "Texas case" became unequivocally *Roe*, feminist aspirations followed. As *Roe* ceased to be *a* case and became *the* case, abortion ceased to be *a* demand and became *the* demand. Starkly absent from the new arrangement were projects aimed at the structural conditions that entrench gender discrimination. As the substantive discussion concentrated on abortion and courts, the terms of judicial disputes permeated NOW's legal imagination and their new utopia was structured around the right to choose. Thus rose *Roe* feminism.

7. Conclusion

The creation of the Reproductive Justice movement in 1994 blatantly exposed *Roe* feminism's shortages. Feminists of color, striving to move away from the my-body-my-choice reduction, proposed a human rights approach to reproductive justice, including the right not to bear children as well as the right to birth children in an adequate socio-economic environment. Still,

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[260] *Id.*
[261] *See supra* note 255.

even Sister Song's attempt to broaden the specific abortion question, to a general reproduction question, remained captive of the rights' compass —institutionally processed as judicially enforceable rights. Despite Reproductive Justice's efforts to the contrary, abortion continues to stand as a metonymy for feminism in public discourse.[262] Further, as symbolically powerful as it is, abortion as a standalone demand remains incapable of defying the socio-political and economic structures that sustain women's oppression. The contemporary equation of feminist struggles and abortion rights misses an essential part of the story. A pernicious effect of the public obsession with *Roe* (and the decisions that followed) is that it occludes the historical contingency behind that equation. Confronted with the fact that a world in which American feminism existed without *Roe* and thrived, we can reclaim and creatively transform *feminist freedom's* legacy so that a capacious and all-encompassing feminist agenda can leave the fringes and make its way to the political mainstream in the United States.[263]

In the United States more than anywhere else, the stakes of the abortion question were raised to the point of overriding the many other issues that continue to oppress women and sustain patriarchal structures. As *Roe* feminism rose, activists replaced freedom with choice. They did so by raising their investment in the judicial discussion, inadvertently carrying it beyond justices' chambers and into their political imaginary. Thus, "the war for freedom" that NOW's President

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[262] *See Echols*, Daring to Be Bad.

[263] The "at least we gave you *Roe*" narrative ties 1960s and 1970s feminism to the abortion decision as the foremost concrete win of the movement. But that version of the story occludes the millions of smaller changes that took place in gendered forms of relations and, more importantly, women's consciousness. Though these changes were in no way sufficient they offer a route and a form to strive for a non-patriarchal society. For a representative example of the "at least we gave you *Roe*" story *see* Molly Jong-Fast, *My Mother Was Wrong*, The Atlantic (2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-overturn-abortion-peaceful-protest/629746/ (last visited Jan. 30, 2023). [https://perma.cc/DXM8-QRVM].

declared feminists were fighting in 1989 was nothing like the fight for *feminist freedom* of the past, but rather a war for choice (and a narrow one at that).

Almost 30 years after the rise of *Roe feminism*, an *amici curiae* by "154 distinguished economists" was presented to the court in *Dobbs*.[264] The brief contested the suggestion other groups had made that "it is impossible to measure the impacts of abortion legalization and that abortion access is no longer relevant to women or their families"[265] and thus indirectly supported the respondents, who asked the court to reaffirm *Roe*. With the tools of causal inference, the brief argued "*Roe* is causally connected to women's advancements in social and economic life."[266] Given the United States' virtually inexistent parental policies, among other structural conditions, the brief claimed that overturning *Roe* would disproportionately affect Black and poor women.[267] It stated that "one common thread is that many of these women [who seek abortions] already face difficult financial circumstances. Approximately 49% . . . are poor 75% are low income, [and] 59% already have children" and that said women also overwhelmingly lacked access to paid maternity leave or affordable child care.[268] As presented by the economists, the loss of abortion would mean the loss of freedom for Black and poor women. Undoubtedly, the outcome faced by women who cannot obtain the abortion they need is horrendous. In that sense, it is certainly true that abortion restrictions will disproportionately harm Black and poor women. Yet, such horror

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[264] Brief for Economists as Amici Curiae Supporting Respondents at 1, Dobbs v. Jackson's Women's Health Org., 142 S. Ct. 2228 (2021) (No. 19-1392), https://www.supremecourt.gov/DocketPDF/19/19-1392/193084/20210920175559884_19-1392bsacEconomists.pdf [https://perma.cc/HWJ6-MNPG].
[265] *Id.* at 1, 20.
[266] *Id.* at 4, 20.
[267] *Id.*at 10.
[268] *Id.* at 23–24.

should not lead us to think then that lack of criminalization (and even access!) equals freedom. Having traced the American trajectory from *feminist freedom* to *Roe feminism,* one is left to wonder what it means to want an abortion in extremely unequal economic conditions.

The *amici's* aim was to evaluate abortion's impact on women's advancement, not women's freedom broadly conceived. Nor, by any means, does criminalization improve women's conditions, quite the contrary. However, the use of abortion as a lens to read more generally into women's condition in the United States is not only a formula used by economists but an apt metaphor for the discussion's current state.

The word sex was not once mentioned in the original text of the Constitution of the United States of America. Its only appearance arrived in the early twentieth century with the ratification of the Nineteenth Amendment. In retrospect, despite the historical particularities, it is hard to fathom that the Bill of Rights would ensure in the Second Amendment the right to bear arms more than a century before the text would incorporate a mention of women (through sex).[269] It is no wonder then that in an unbelievably arid constitutional terrain for feminist aspirations, until recently, *Roe* stood as the paradigmatic federal recognition of women's fundamental autonomy in the American imaginary. Still, *Roe's* short-lived half-century brought with it not only constitutional hope but, inadvertently, a particular way of framing feminist aspirations, as matters

[269] The Nineteenth Amendment was ratified in 1920 formally giving women the right vote (though many Black women were excluded through the infamous literacy tests and grandfather clauses that expanded throughout the South.) The first self-governing country or colony to grant the vote to all adult women was New Zealand in 1893. For a legal analysis of the grandfather clauses at the time of their passing *see* J. W. Sumers, *The Grandfather Clause*, 7 Lawyer Bank. South. Bench Bar Rev. 39 (1914), a timeline of the earliest countries and colonies to give women the vote *see* Ministry for Culture and Heritage New Zealand, "World Suffrage Timeline," accessed February 3, 2023, https://nzhistory.govt.nz/politics/womens-suffrage/world-suffrage-timeline. [was unable to permalink].

of rights, and more importantly judicially enforceable entitlements and choice. Against the hopelessness brought by *Dobbs'* curtailment of pregnant people's basic constitutional rights, I hope this story can bring a tint of hope. This is not a call to return to the past, which has ceased to inhabit us—and for good reasons—but one to rediscover the contingency behind America's mainstream discussions about feminism and its hidden possibilities. Feminism without *Roe* is possible and, in fact, exciting.

CONCLUSION

"The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with the people who had indeed lost all other qualities and specific relationships —except that they were still human. The world found nothing sacred in the abstract nakedness of being human."
Hannah Arendt, The Origins of Totalitarianism, 299.

The primary form through which the preceding pages examine the changing lives of inequality and community is through their relation to rights. Rights remain a potent mobilizing force. In everyday conversations and elaborate political platforms, rights continue to carry momentous weight. Calls for rights cross partisan lines and often appear even among those who deem themselves apolitical. Rhetorically, rights operate as the political currency of our times. In the afterlife of what historian Daniel Rodgers has described as an "era of disaggregation, a great age of fracture" in which "imagined collectivities shrunk," rights, as the eminent domain of the individual, fit the time's image of justice.[1] As "all that is solid" continues to "melt[] into air,"[2] rights offer a sense of stability and structure in a world on the constant verge of collapse.[3]

But to speak of rights in the twenty-first century is to speak about a whole host of things. As the previous chapters suggest, rights exist in the world in many forms, as declarations, demands, aspirations, dreams, relations, decisions, and challenges. Despite their alleged timelessness, rights exist in concrete forms and spaces, and their meanings are directly dependent upon the larger ecosystems that host them. Context thus delimits the form of rights. Their meaning depends on their historical existence, that is, on the

[1] Daniel T. Rodgers, *Age of Fracture* (Cambridge, MA: Belknap Press, 2012), 3.
[2] The phrase was originally coined by Karl Marx and Fredrich Engels in the Communist Manifesto but I am referring specifically to Marshall Berman's interpretation. Berman's analysis of the experience of modernity explores the contradictions the modern subject faces. The essence of the modern experience is inhabiting a space of endless possibility, which is tethered to an incessant threat of destruction. Despite the profound changes the idea of the modern has gone through, the experience of modernity Berman teases out through his analysis of nineteenth and twentieth–century men is still relevant for twenty–first–century people. See Marshall Berman, *All That Is Solid Melts into Air: The Experience of Modernity* (Baskerville: Penguin, 1988).
[3] For an argument of the moral wreck of modern life as a result of a lack of uniting ethos see Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed (Notre Dame, Ind: University of Notre Dame Press, 2007).

material ways they appear in a particular time, place, and people. Consequently, the political might of rights is inescapably subject to their concrete manifestation in specific contexts.

That rights can be many things does not overlook the fact that they are often not. In the United States, all too often rights appear only as part of the judicial domain. The intuition that propelled these pages was that the contemporary obsessions with rights erode political discussions by failing to account for our needs as community members. After probing this intuition, I am less convinced about the centrality of rights to the critique. Instead, as the previous pages reveal, what I have described as rights' privatizing syntax is the product of judicially enforceable rights rather than rights in general. Thus, the centrality of the role of the judiciary in contemporary political discussions translates into rights' individualizing vocation because rights become (only) legal rights. The higher the part courts play in the political imaginary, the larger the centrality of judicially enforceable rights.

It is then all the more disheartening that precisely in the judicial arena, rights manifest as entitlements not born out of concrete social relations but as seemingly immanent truths. Arendt's words, referred to in the epigraph in relation to human rights, remain ominously prescient even in national contexts: the assertion of abstract and universal rights proves sterile the moment a political community ceases to sustain them. In the case of a nation, the assertion of capacious and general rights proves sterile when the community lacks the social infrastructure (or will) to sustain them. Rights (imagined primarily as judicially enforceable entitlements) remain our political currency. At the same time, their purported immutability and universality (even if within the bounds of a nation) cut against the material relations that cement their efficacy. Those material relations form the infrastructure that guarantees the reclaimed rights. The paradox, then, is that in the very forum where a political community adjudicates what is due to its members, those members appear as isolated interest-bearers. In other words, the political community that sustains those rights can only be approached from that forum as a sum of interest-bearing individuals. Therefore, as judges adjudicate individuals' rights, the embeddedness of those rights in a political community is obscured. The

community and relations that pump life into those rights remain out of the scene. This absence is especially troubling when court-enforceable rights play an important role in the political imaginary.

Whereas these pages have established the absence of a meaningful space for communities in judicial rights discourse, more work needs to be done to uncover what such a space would look like. With regard to inequality, the pieces have pointed toward ways in which subjects' ideas of distribution can be influenced by rights. In that context, rights operate as particularizing forces that obscure the structural conditions that prompt inequality. However, at this point, these tensions have been merely pointed out. The final paper of the series begins to explore these questions as it delves into activists' actions and demands during the period of "feminist freedom." By surveying a sample of feminist practices and institutions, it offers a preliminary revision of alternative forms of experiencing community and inequality. Nevertheless, the precise contours and syntax of such practices, projects and spaces were merely gestured towards, and a deeper historical inquiry is required to articulate them.

Though this work is mainly diagnostic and does not offer an exploration of how community needs and inequality could be re-imagined, I want to provide a final reflection that can help with the task. Re-imagining communities and how to address inequality can come about by reconstructing and understanding the range of past political imaginaries.[4] By discerning past possibilities, we can better recognize the limitations of our current time. For this, I will focus on the last piece of the series to elucidate a way to think about the role of rights, as building blocks of the political imaginary. Thinking of the role of rights in this way can help appreciate their rootedness in a more complex constellation of aspirations, which at the same time is organized by those rights as the prevailing political form of our time.

[4] For a similar understanding of history see Adom Getachew, History's Presence | Adom Getachew, interview by Nawal Arjini, accessed August 18, 2023, https://www.nybooks.com/online/2023/08/12/historys-presence-adom-getachew/.

The Issue

As "Feminism Without Roe" shows, the advent of "Roe feminism" redefined the stakes and terms of feminists' political disputes. By the 1990s, the multilayered canvas of political projects, ideas, and experiments of the previous decades had been greatly reduced. What in the 1960s had begun as a social force that radically transformed the horizon of expectations, opening a wide range of possible futures, had drastically changed.[5] However, not only the social effervescence of the 1960s and 1970s was largely gone, but so was the polychromatic political imaginary formed by innumerable activists and movements. Feminists' imaginaries around rights had shifted from NOW's Bill of Rights (which included aspirations on education, reproduction, economic equality, labor, and sexuality) towards the paradigmatic right to choose.

As feminists strove to re-imagine their world from different directions during "feminist freedom," the movement's demands expanded the horizon of what was possible, even if not likely.[6] As the previous pages show, the depth of that horizon was inextricably tied to the broader landscape in which it existed. As a case study, the trajectory of feminist activism shows that demands are an essential brick in the construction of where the political horizon lies.[7]

Still, the bricks did not account for the whole extent of the aspirations, or, as a Berkely student slogan put it: "The Issue Is Not the Issue."[8] That is, the demands do not amount to the horizon. Put differently, the demands over which activists organize do not fully grasp the extent of the political

[5] Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time*, trans. with an introduction by Keith Tribe (Columbia University Press, 2004).
[6] Reflecting on how law can be articulated differently, within a radical horizon in the cases of Black Lives Matter see Amna A Akbar, "Toward a Radical Imagination of Law," *NYU L. Rev.* 93 (2018): 405.
[7] For a framework on the relation between movement demands and political horizons see Katrina Forrester, "Feminist Demands and the Problem of Housework," *American Political Science Review* 116, no. 4 (November 2022): 1278–92, https://doi.org/10.1017/S0003055422000053.
[8] Feminist activists had drawn inspiration from, and widely collaborated with, different movements; especially civil rights and student groups. See Wini Breines, *Community and Organization in the New Left, 1962-1968: The Great Refusal* (Rutgers University Press, 1989)., p. 18.

transformation they aspire to, which is much more extensive. Thus, in the case of feminist activism, demands on women's labor rights, media stereotypes, daycare access, healthcare, and many others were not *the* issue. Seen as isolated demands, one would miss how the real issue was a general project aimed at structural transformations. What "Feminism Without Roe" describes as a period of "feminist freedom" was thus not only characterized by the issues activists prioritized but by the world they pre-figured by so doing.

However, the later developments demonstrated that although the issue was not *just* the issue*,* it was still relevant. Its importance came less from its subject matter than its form. The "issue" was relevant as an articulating force, a structuring form. In the case of feminist activism, the issues activists fought for changed as courts became increasingly more relevant. As "Feminism Without Roe" shows, rights and courts became substantial as articulating *issues* for the feminist political imaginary.

The rise of "Roe feminism" meant that feminist political projects were deeply transformed. As abortion –imagined as abortion rights mediated through courts— became the prevalent *issue*, the surrounding and underlying political understandings and aspirations that were "not the issue" were carried with it. In part, the student slogan rightly emphasized how the issue was but an entrance to the all-encompassing projects that lay underneath. Nonetheless, by excessively focusing on the effervescence of what was not the issue, we may lose track of the significance of "the issue" not as a demand but as an organizing principle, a lens through which "what is not the issue" is mediated. Thereof, the horizon of possibilities is intricately connected not just to what is not the issue but to how the political imaginary is articulated, precisely, through the issue.

Rights as Metaphor: Unravelling the Political Imaginary

The rise of Roe feminism redirected the discussion over women's social, political, and economic position to abortion. As judicial disputes rose within NOW's priorities, abortion became the organizing principle of women's rights. In this process of reorganization, relations, communities, and structures disappeared from the spotlight of feminist aspirations. To be sure, to some extent all these notions were present in both moments (feminist freedom and Roe feminism). But the centrality of each was inversely proportional. What was altered in Roe feminism was the relation between abortion and the other demands. The shifting relation between choice and structural demands functioned within feminist activism as a metaphor.

Structural demands, choice and women's rights consecutively performed in the feminist imaginary, the way concepts operate in what Max Black described as the interaction view of a metaphor.[9] That is, for a metaphor formed by two concepts, one term reorganizes the associations that frame the other. During Roe feminism, feminist demands were mediated through abortion. Aspirations on other realms of life were thus organized through the lens of abortion and choice. Of course, within this framework, even as "stand-alone" (or articulating) concepts, terms exist in a particular community, and the associated meanings spring from the shared ideas of that community. Abortion does not convey the same system of associations to everyone. Nonetheless, though people's list of concepts and their order may slightly vary, the existence of shared ideas within a linguistic or political community implies there will be a roughly shared hierarchy of core concepts that will constitute the system of common places. It is that constellation of concepts that constitutes the political imaginary of a community. The political imaginary of those who by 1990 identified primarily as pro-choice was thus constituted by the elements

[9] The interaction view of a metaphor focuses on the meaning that emerges from the association of two terms, an interaction between the "system of associated common places". That is, each term suggests a system of shared associations (that infuse the term of shared meanings) that are roughly hierarchically organized in relation to the main concept. In Black's example, "Man is a wolf" the word "wolf," associated to a carnivorous creature, predator, strong, etc., reorganized the word "man" so as to emphasize some aspects of its own system of associations and suppress others. See: Max Black, *Models and Metaphors: Studies in Language and Philosophy* (Cornell University Press, 1962), https://www.jstor.org/stable/10.7591/j.ctvr6971f.

that were common to the associations of most activists. In contrast, during the period I referred to as feminist freedom, the political imaginary was roughly characterized by a relation of citizenship and autonomy. As "Feminism Without Roe" reflects, by taking matters into their own hands' feminists disputed particular problems and, at the same time, the way society was organized. In the process, they created a different shared world.

Although demands were not explicitly articulated in those terms, the institutions, actions, and projects activists presented and envisioned can be better understood as embodying the relation of citizenship-autonomy first, and abortion-choice, second. In this way Black's view of the interaction metaphor helps us understand what constitutes the feminist political imaginary. That is, the relation between citizenship and autonomy first, and abortion and choice, later, operated as an interaction metaphor. Rights' role changed as their position within the hierarchy of associations –and the terms they were connected to— shifted.

The political imaginary during feminist freedom consisted of the relation of the systems of common places associated with "citizenship" and "autonomy." During that period, the feminist political imaginary questioned societal assumptions about women's roles and needs. By rehearsing alternative comprehensions about what it meant to be a unique and valuable member of the community, activists tied together forms of political belonging, democratic participation, care, autonomy, equality and rights as ways of dismantling gender hierarchies. Under the umbrella of autonomy, ideas of will, freedom, self-discovery, and subject–formation coexisted. Citizenship condensed many forms of belonging to the political community: economic, social, and cultural. Through their reciprocal resignification, citizenship and autonomy mutually reorganized the commonly associated concepts of each (as a standalone notion) to give rise to the feminist political imaginary of feminist freedom. Consequently, women's rights figured in NOW's Bill of Rights as routes to change structural conditions of inequality.

As for Roe feminism, the systems of commonplaces associated with "abortion" and "choice" were mutually reorganized, giving new meaning to the idea of women's rights. Abortion included demands for a constitutional right to abortion, for secure abortion access through public funding, and normalizing abortion as a woman's prerogative. Choice comprised ideas of autonomy, self-determination, and decision-making power, but the conditions under which those decisions would be made were less ostensible. In courts, legislatures and even massive rallies, feminists all around the nation demanded a right to choose. The relation between abortion and choice as articulated by feminist activists during the late 1980s and early 1990s constituted the feminist political imaginary of the time.

As these brief characterizations portray, it is not so much that demands for women rights disappeared or emerged but that the ways in which they were articulated was deeply transformed. Understanding the political imaginary thus is crucial to properly address the question of rights. My use of the interaction metaphor in this context is meant to signal a way forward in the study of political imaginaries.

It was not the appearance of rights that altered feminists' political imaginary but the changing ways through which their demands were articulated.[10] These, in turn, were the product not of abstract discussions but of shifting practices and worldviews. The political imaginary was thus transformed partly because of the changing role of rights as articulating concepts. In the first period, rights were not articulated necessarily or even primarily as court-enforceable entitlements. In the second, in contrast, as abortion rights gained center stage in feminists' political imaginary, they did so with judicial arena as their most conspicuous site of dispute. None of these iterations were necessary, nor their contours static. But they were very real, as were their consequences. The political imaginary is thus not just an idea, but a sphere of possibility created by the relation of a people's practices and aspirations. Examining its

[10] For a reflection on the significance of the imaginary see Cornelius Castoriadis, *The Imaginary Institution of Society* (MIT Press, 1997).

transformations across history can help us better apprehend the ways in which the world existed differently. By surveying past political imaginaries, we can appreciate the contingency behind our own and begin to envision different routes for the future.