

THE PRICE OF PRIVACY, 1973 TO THE PRESENT

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The legal academy has not been kind to the privacy rationale set forth in *Roe v. Wade*. *Roe* is seen to have promoted a single-issue agenda based on the importance of privacy and choice. Because *Roe* so quickly came under attack, its defense became a priority, and activists speaking out in favor of the opinion felt encouraged to defend it on its own terms. If the abortion issue were a matter of ordinary politics rather than constitutional law, the argument goes, activists would be free to develop more compelling claims for reproductive rights and to pursue a broader reproductive-health program.

Other scholars have studied work of the social movement's activists and attorneys who helped to shape pre-*Roe* advocacy and to influence the Court's decision. This project is unique, however, in offering the first explanation of the emergence, ascendancy, and persistence of crucial choice-based claims that have defined the law and politics of abortion in the past several decades. This history suggests that *Roe* alone was not responsible for the emergence or the staying power of the choice framework. Since 1973, abortion-rights activists prioritized choice arguments not only because of *Roe*, but also because of the need to respond to antiabortion tactics and to changing political opportunities. Ordinary politics reinforced rather than undermined the choice framework.

Based on this history, this Article argues that de-constitution-alizing the abortion issue would do little to dismantle the choice-based frame. At a minimum, the abortion-rights movement will have to do more to make abortion, and the women who benefit from it, more visible and sympathetic to the public. Removing the Constitution from the equation will do little to change this basic dynamic.

<i>Introduction</i>	286
<i>I. The Rise of Choice Arguments</i>	290
<i>A. Choice Arguments Form One Part of a More Complex Argumentative Agenda</i>	292
<i>B. After Roe, Movement Members Transform the Court's Understanding of Choice</i>	295

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C. <i>Movement Emphasis on Electoral Politics Increases the Appeal of Choice</i>	297
D. <i>The Movement Downplays Choice Arguments in an Effort to De-Stigmatize Abortion</i>	301
E. <i>The Battle for the Freedom of Choice Act Narrows Activists' Choice Arguments</i>	305
F. <i>Responding to a Resurgent Pro-Life Movement, Activists Favor Choice-Based Claims</i>	309
G. <i>The Partial-Birth Abortion War and Generational Turnover Solidify Choice Arguments</i>	311
II. <i>Beyond Abortion: Expanding the Agenda, 1973–1981</i>	315
A. <i>Movement Dissenters Respond to Roe by Creating a Multi-Issue Agenda</i>	316
B. <i>A New Political Environment Makes a Single-Issue Approach More Compelling</i>	319
III. <i>Ordinary Politics, Constitutional Law, and Social Change</i> ..	322
A. <i>Reconsidering the Costs of Constitutionalizing the Abortion Issue</i>	323
B. <i>Toward a Richer Approach</i>	326
<i>Conclusion</i>	328

INTRODUCTION

The legal academy has not been kind to the privacy rationale set forth in *Roe v. Wade*.¹ Described as the Supreme Court's most controversial decision,² *Roe* and its companion case, *Doe v. Bolton*,³ struck down the vast

¹ For a sample of the scholarship that is critical of *Roe*'s choice framework, see Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 52–53 (Jay L. Garfield & Patricia Hennessey eds., 1984) (criticizing *Roe*'s emphasis on choice and privacy instead of equality); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 930 (1973) (arguing that outlawing abortion is not about "governmental snooping" into citizens' private lives); Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 *HARV. C.R.-C.L. L. REV.* 329, 331, 371, 373 (2010); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 *N.C. L. REV.* 375, 386 (1985) ("Overall, the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955, 1020 (1984) ("The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied. . . . The rhetoric of privacy also reinforces a public/private dichotomy that is at the heart of the structures that perpetuate the powerlessness of women.").

² *See, e.g.*, Jack M. Balkin, *Roe v. Wade: An Engine of Controversy*, in *WHAT Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision* 3 (Jack M. Balkin ed., 2005) ("If *Brown v. Board of Education* is America's most hallowed modern Supreme Court decision, *Roe v. Wade* is surely its most controversial."). A word about terminology is in order here. I refer to supporters of legal abortion primarily as feminists and abortion-rights activists, and I describe the opposition

majority of abortion laws then on the books.⁴ A 7-2 majority opinion in *Roe* explained that constitutional protections covering family, marriage, and procreation extended to a woman's decision to terminate her pregnancy.⁵ The Court presented the abortion right as a freedom from state interference—a right that allowed women to make a crucial life decision without government meddling.⁶ In borrowing from *Roe*'s rhetoric and reasoning, the abortion-rights movement supposedly offered a similarly impoverished understanding of reproductive rights, one disconnected from the importance of state assistance for poor women and from other compelling rationales for reproductive autonomy. Moreover, because *Roe* so quickly came under attack, movement members made its defense a priority, and movement leaders speaking out in favor of the opinion felt encouraged to defend it on its own terms.⁷ Other scholars and commentators have expressed concern that the opinion shaped the rhetoric of reproductive-rights supporters⁸ and discouraged them from pursuing a broader and more promising reproductive-justice agenda.⁹ On this

as either antiabortion or pro-life. As this Article argues, “pro-choice,” the term favored by contemporary activists, did not commonly appear until later in the 1970s. For that reason, this Article refers to movement members as pro-choice only when describing the views of other scholars or more recent chapters in movement history. While not all abortion-rights supporters were feminists, some of them resembled what Serena Mayeri has called legal feminists, and this Article refers to them as such. See Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 758 (2004).

³ 410 U.S. 179 (1973).

⁴ See, e.g., JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 94–95 (2006) (explaining how the Court's decision struck down laws on the books in 46 states).

⁵ *Roe v. Wade*, 410 U.S. 113, 168–70 (1973).

⁶ See, e.g., *id.* at 169–70 (explaining that the “unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child . . . necessarily includes the right of a woman to decide whether or not to terminate her pregnancy”).

⁷ See, e.g., Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1396 (2009) (outlining the “costs to feminist ideals that are produced by our reliance on the creation of an individual right as the conceptual vehicle for legal abortion, and our reliance on adjudication as the strategic vehicle for the right's development and justification”).

⁸ Cf. Carol Sanger, *About Abortion: The Complications of Category*, 54 ARIZ. L. REV. 849, 871 (2012) (“Without the threatened reversal of *Roe* looming over everything, as it has for some 40 years, there is perhaps room to consider aspects of abortion that were thought too risky, from an advocacy perspective, to discuss.”).

⁹ See, e.g., West, *supra* note 7, at 1400 (“Part of the story—maybe the major part—is a widespread belief among the pro-choice community in the opinion's relative vulnerability.”). On the spread and costs of “the choice rhetoric of *Roe*,” *id.* at 1411, see, for example, *id.* at 1401–12. For further discussion of *Roe*'s costs, see, for example, Rebecca L. Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 31 (2012) (“[T]he right to privacy yields no positive rights to funding or access [to] support from the government; it is relegated to the land of negative rights, which might provide the right woman with reproductive choice free from government intrusion, but for the wrong woman—one with limited resources—the so-called ‘choice’ becomes non-existent.”); Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1, 24 (2011) (“*Roe* has not been a ready platform for thinking about abortion in terms of women's right to health care.”).

basis, scholars argue that abortion politics would be more meaningful if the movement deemphasized constitutional law or if the Supreme Court de-constitutionalized abortion altogether.¹⁰ These commentators conclude that returning abortion to ordinary politics would make the abortion battle less polarized, more nuanced, and ultimately more productive.¹¹

Other scholars have studied the social movement activists and attorneys who helped to shape *Roe v. Wade*.¹² This project adds a new dimension by offering the first explanation of the emergence, ascendancy, and persistence of crucial post-1973 choice-based claims that have defined the law and politics of abortion in the past several decades. The history studied here suggests that the Supreme Court's decision alone does not explain the rise or the staying power of the choice framework.¹³ Abortion-rights activists prioritized choice arguments because of the need to respond to antiabortion tactics and to changing political opportunities. In advancing such claims, movement members set out an understanding of choice that differed significantly from that of the Supreme Court. While the Court described abortion as a medical decision belonging to the physician and patient,¹⁴ the abortion-rights move-

¹⁰ See, e.g., West, *supra* note 7, at 1400–01. For further discussion of the costs of the constitutionalization of abortion, see ELIZABETH MENSCH & ALAN FREEMAN, *THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE?* 4 (1993) (explaining that the “result” of the constitutionalization of the abortion issue was “an ever-deepening cultural divide”); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1561 (1991).

¹¹ See, e.g., West, *supra* note 7, at 1428 (“The need to shoehorn arguments for choice into constitutional form has not only forced the ‘right to an abortion’ into its current truncated and negative form . . . it has also muted arguments for reproductive choice that are pragmatic and time-bound.”).

¹² See, e.g., *BEFORE Roe v. Wade: Voices That Shaped the Abortion Debate Before the Supreme Court’s Ruling* (Linda Greenhouse & Reva Siegel eds., 2d ed. 2012) [hereinafter *BEFORE Roe v. Wade*]; GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* (2005); DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF Roe v. Wade* (1998); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973* (1997); Reva B. Siegel and Linda Greenhouse, *Before (and After) Roe: New Questions About Backlash*, 120 YALE L. J. 2052, 2052–72 (2010). William Saletan has offered an in-depth study of why choice arguments gained influence in the late 1980s—a development that, in Saletan’s view, helped to explain progress made by the antiabortion movement. See generally WILLIAM SALETAN, *BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WARS* (2003). No previous study, however, captures the changes made to the choice framework or the reasons for its staying power.

¹³ On the reinterpretation of *Roe*, see generally 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) [hereinafter Ziegler, *Framing of a Right to Choose*].

¹⁴ See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (cataloguing the physical and psychological harms that may result from carrying a pregnancy to term); *id.* at 164 (holding that in the first trimester, “the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician”); see also LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 13 (1990) (noting that Justice Blackmun had served as counsel to the Mayo Clinic prior to his appointment to the Supreme Court and suggesting that he may have been influenced by his medical background to focus the opinion on the rights enjoyed by physicians); cf. Ruth Bader Ginsburg, *Speaking in a*

ment reinterpreted the opinion as a symbol of women's interests in autonomy, privacy, and decisional freedom. Later, movement members transformed choice arguments to take advantage of changes to the larger American political landscape: shifts such as the evolution of abortion into a major political issue, the public's embrace of a small-government philosophy, and the pro-life movement's stigmatizing of the abortion procedure. Ordinary politics reinforced rather than undermined the choice framework.

Based on this history, this Article argues that de-constitutionalizing the abortion issue would do little to dismantle the choice-based frame. In order to build support for a more comprehensive reproductive-justice agenda, the abortion-rights movement will have to change public attitudes toward sex equality, the social welfare net, and socioeconomic justice, much as abortion opponents have worked to change the way the public defines the fetus, the act of abortion, and the meaning of human life. Choice-based claims have remained prominent partly because polls indicate that Americans react favorably to them.¹⁵ Changing public attitudes will be difficult, as it has been in the past. But at a minimum, the movement will have to do more to make abortion, and the women who benefit from it, more visible and sympathetic to a public uncomfortable with the procedure. Removing the Constitution from the equation will do little to change this basic dynamic.

This Article proceeds in three parts. Part I examines the ascendance of choice-based arguments in abortion-rights advocacy in the four decades after 1973. As this Section shows, the Court's decision does not explain the movement's ongoing attraction to the idea of a right to choose. Indeed, while stressing concerns about choice, activists substantially reworked *Roe's* rhetoric, highlighting the rights of women rather than those of physicians. Moreover, the movement often described a right to choose that is far broader and more abstract than the one set forth by the Supreme Court. Choice contentions gained prominence in large part because of the political benefits thought to flow from them.

Part II chronicles the movement's much-criticized turn to a single-issue approach to abortion—one in which the abortion issue received more attention than did other matters of reproductive health. Critics of the *Roe* decision suggest that the Supreme Court's intervention helped to convince pro-choice activists to privilege abortion at the expense of a more comprehensive approach to reproductive rights. In preserving a fragile victory, movement members supposedly had to channel scarce financial resources and political capital into the abortion struggle, with little left for battles involving child care, healthcare, or sterilization abuse. This Section questions this conventional account by telling the story of a post-1973 struggle to create a broader

Judicial Voice, 67 N.Y.U. L. REV. 1185, 1199–1200 (1992) (highlighting *Roe's* emphasis on the physician's judgment).

¹⁵ For an example of polls of this kind conducted by the abortion-rights movement, see E. J. Dionne, *Abortion Rights Backers Adopt Tactics of Politics*, N.Y. TIMES, July 21, 1989, at A6.

reproductive-justice agenda, focused on issues from contraception to sterilization abuse and child care. Ultimately, when movement dissenters endorsed a single-issue approach, they did so for practical reasons, including the immediate threat to legal abortion and the lack of support for welfare rights. Part III explores the normative implications of this history for contemporary movement activists, and the last Part briefly concludes.

I. THE RISE OF CHOICE ARGUMENTS

In the years since 1973, scholars have identified ways in which the Court's idea of privacy has distorted public debate about abortion.¹⁶ Robin West argues that a "widespread belief among the pro-choice community in the [*Roe*] opinion's relative vulnerability" has deterred "criticism of the decision by those who politically support legal abortion."¹⁷ According to West, feminists avoided criticism of *Roe*'s choice rhetoric both because the decision represented a major victory for supporters of legal abortion and because they feared that the Court would overrule its prior decision.¹⁸ As *Roe* frames it, abortion as a right to choose protects women from State interference. However, "the choice rhetoric of *Roe* undercuts the arguments for . . . the rights of caregivers . . . to a level of public assistance for their caregiving work."¹⁹ By failing to expose the shortcomings of this idea of choice, feminists supposedly accepted a framework that legitimated "[a] profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent."²⁰ Scholars like West also identify profound "opportunity costs" associated with the constitutionalization of abortion²¹: first, by trying so hard to save *Roe*, the movement failed fully to pursue a broad reproductive-justice agenda.²² Second, in

¹⁶ See, e.g., Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991); see also Michael J. Klarman, *Fidelity, Indeterminacy, and the Problem of Constitutional Evil*, 65 FORDHAM L. REV. 1739, 1751 (1997) (describing the "conventional understanding of *Roe v. Wade*" as the notion that, "far from reconciling abortion opponents to a woman's fundamental right to terminate her pregnancy, the decision actually spawned a right-to-life opposition which did not previously exist").

¹⁷ West, *supra* note 7, at 1400.

¹⁸ *Id.* at 1400–04; see also MacKinnon, *supra* note 1, at 51; Marcy Darnovsky, "Moral Questions of an Altogether Different Kind," *Progressive Politics in the Biotech Age*, 4 HARV. L. & POL'Y REV. 99, 110 (2010) ("The battle for abortion rights has become all but synonymous with the term 'choice,' and arguments that draw on other values have long been more muted."); West, *supra* note 7, at 1397–98; cf. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364–70 (1984) (using abortion as an example of the instability of constitutionally protected rights).

¹⁹ West, *supra* note 7, at 1411; see, e.g., Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 81 (2011) ("The choice to hold fast to *Roe*, particularly its emphasis on individual rights and privacy, has alienated many women of color and poor women.").

²⁰ West, *supra* note 7, at 1409.

²¹ See, e.g., *id.* at 1426–32; see also *infra* notes 24 and 25 and accompanying text.

²² See, e.g., Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 327 (1991) ("[T]he

privileging abortion and choice, feminists might have lost out on alliances with pro-lifers interested in “minimizing the cost of mothering, enforcing and strengthening the rights of pregnant women, advocating the responsible use of birth control, insisting upon sensible anti-rape policies, and discouraging unwanted sex.”²³ Finally, commentators conclude that by defending the *Roe* decision and a related idea of choice, the movement failed to offer more compelling or morally nuanced claims, diverting political capital, resources, and time to the preservation of legal abortion.²⁴

This Section evaluates these criticisms by documenting the lost history of choice-based arguments for abortion in the aftermath of the opinion. Studying this history reveals that the abortion-rights movement did not simply adopt the Supreme Court’s understanding of choice or privacy—far from it. Instead, in highlighting such arguments, movement members offered a vision of choice that differed substantially from the one present in the *Roe* decision. As importantly, movement members revised their choice arguments in response to changes to the larger political terrain, alternatively emphasizing and downplaying concerns about women’s equality and socioeconomic justice.

Moreover, the decision to emphasize choice arguments reflected much more than the need to preserve a fragile victory in the Supreme Court. Instead, movement members foregrounded choice contentions as a way to gain influence in electoral politics or to respond to growing public anxiety about the abortion procedure and the welfare state.

The Section begins by tracing the emergence of choice reasoning in the pre-1973 abortion-rights movement. Choice arguments flourished in a complex rhetorical agenda that also featured contentions involving equal citizenship for women and authority for doctors. While facing challenges from their colleagues, movement pragmatists often emphasized the claims thought most likely to achieve immediate political results. After exploring the terms and stakes of the *Roe* decision, the Section next charts the evolution of choice arguments in the decade after 1973. At first, movement members offered interpretations of privacy and choice that differed radically from the Court’s own. While the *Roe* decision assigned physicians tremendous importance, activists described abortion as a right belonging exclusively to women. Equal citizenship for women remains muted in the Court’s decision,

popularity of the abortion debate is a reflection of the position of essentialism because this debate chooses one issue for debate—abortion—and generally ignores the larger and more complex problems relating to reproductive health issues, of which pregnancy is only one part.”).

²³ West, *supra* note 7, at 1432; see also Williams, *supra* note 10, at 1559–61.

²⁴ See, e.g., West, *supra* note 7, at 1428 (contending that “the focus on the abortion right has diverted resources not only from political and legal possibilities for promoting reproductive justice, but also from other forms of social persuasion, including moral argument, that might reduce the number of unwanted pregnancies women experience”). For commentators’ perspectives on a better foundation for abortion rights, see *supra* note 1 and accompanying text.

but some movement members explicitly presented the decision as one involving both equality and autonomy for women.

Only in the later 1970s did narrower, choice-based arguments take on new importance in the movement's advocacy. In the period, as the Section shows next, organizations like the National Association for the Repeal of Abortion Laws ("NARAL") and the National Organization for Women ("NOW") responded to a series of political setbacks: antiabortion victories in state legislatures, the passage of the Hyde Amendment (a federal ban on Medicaid funding for abortion), and a series of Supreme Court opinions upholding state bans on the public funding of abortion. Movement leaders attributed these defeats to the opposition's success in electoral politics. In formulating a response, abortion-rights activists stressed the idea of choice as a way of maximizing voter support for legal abortion.

The Section then turns to the political opportunities in the 1980s and 1990s that continued to shape NARAL and NOW's rhetorical strategy. In the mid-1980s, in a campaign called "Silent No More," the movement played up the importance of race and sex equality partly because the idea of a right to choose had not seemed politically effective in the first few years of the decade. Later in the 1980s, when these organizations returned to a conventional choice argument, they did so to capitalize on the possibility of passing a statute to codify *Roe*, seeking to appeal to Americans ambivalent about abortion rights. Beginning in the 1990s, when the movement found itself embroiled in the battle over intact dilation and extraction abortion (intact D&E), choice-based arguments served to distract public attention from highly controversial late-term abortions.

As this history makes apparent, movement members forged an idea of choice that differed considerably from the one advanced by the Court. The Supreme Court did not determine the prominence of choice arguments or even control the way in which abortion-rights advocates defined a right to choose. The ascendancy of a right to choose resulted from inter-movement dialogue and changing political opportunities as much as from the 1973 decision.

A. *Choice Arguments Form One Part of a More Complex Argumentative Agenda*

Before 1973, as David Garrow chronicles, the abortion-rights movement developed a powerful, privacy-based argument that abortion bans were unconstitutional.²⁵ Outside the courts, by contrast, claims about choice formed only one part of a much more complex strategy.²⁶ Before 1973, leading activists sometimes turned to choice arguments. For example, in announcing the formation of the first single-issue abortion-rights organization,

²⁵ See generally GARROW, *supra* note 12.

²⁶ See Ziegler, *Framing of Right to Choose*, *supra* note 13, at 281–83.

NARAL (then the National Association for the Repeal of Abortion Laws), Representative Shirley Chisholm, the organization's honorary president, a feminist, and a civil rights activist, described the founding as "an historic occasion in the arduous struggle of American women to free themselves from oppression and discrimination."²⁷ She explained that "every woman must be guaranteed—as her inalienable right—the freedom to choose whether or not she will bear children."²⁸ At the same time, however, Chisholm suggested that women would not exercise that right without supervision: the law should treat abortion as "a medical decision between a *woman and her physician*."²⁹

Before *Roe*, the abortion-rights movement also described abortion as a public health issue, a matter of good medical practice, and an effective method of curbing population growth.³⁰ In 1969, for example, the organization sent a petition to doctors intended to reflect support in the medical community for abortion. The petition asserted: "Abortion law repeal is our concern because we must be able to practice medicine in the best interest of our patients and according to the highest standards of our profession."³¹ By November 1972, the group circulated pamphlets emphasizing that doctors supported legal abortion, and NARAL pushed doctors to lobby state legislatures considering repeal.³² NARAL also linked its cause to the then-popular movement to curb population growth at home and abroad.³³ The organization's debate handbook included arguments that legal abortion might have prevented the birth of Hitler³⁴ and might "decrease the number of unwanted children . . . and possibly subsequent delinquency, drug addiction, and a host of social ills"³⁵

Of course, before *Roe*, feminists offered rights-based claims for abortion that went beyond the vision of choice Chisholm originally articulated. Within NARAL, feminists such as Chisholm, Betty Friedan, and Conni Finnerty urged the organization to tie abortion more closely to women's rights to self-determination and equal citizenship.³⁶ The National Organization for

²⁷ Press Release, Shirley Chisholm, NARAL Pro-Choice America (Sept. 29, 1969) (available in The Lawrence Lader Papers, Countway Medical Library, Harvard University).

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ See, e.g., Ziegler, *Framing of a Right to Choose*, *supra* note 13, at 281–83.

³¹ Petition, NARAL (n.d., ca. 1969) (available in the NARAL Papers, MC 313, Carton 1, Schlesinger Library, Harvard University).

³² Meeting Minutes, NARAL Executive Committee (Nov. 27, 1972) (available in the NARAL Papers, MC 313, Carton 1, Schlesinger Library, Harvard University).

³³ See, e.g., Ziegler, *Framing of a Right to Choose*, *supra* note 13, at 281–87.

³⁴ Excerpt, NARAL Speaker and Debater's Handbook (n.d., ca. 1972) (available in the NARAL Papers, MC 313, Carton 7, Debating the Opposition, Schlesinger Library, Harvard University).

³⁵ *Id.*

³⁶ For examples of Finnerty, Friedan, and Greitzer's work in NARAL, see *Feminists Use Lysistrata Tactic*, L.A. TIMES, Mar. 19, 1970, at G11 (describing the work of NARAL leader Conni Finnerty in organizing feminist protests); Eileen Shanahan, *Doctor*

Women, a group that Friedan led, at times described abortion as a civil right for women.³⁷ Essays by Florynce Kennedy of NOW and Frances Beal of the Student Non-Violent Coordinating Committee insisted that abortion made a particular difference for women of color, who connected abortion rights to contraception, sterilization abuse, child care, and broader reproductive-justice concerns.³⁸ Similarly, in February 1969, feminist group the Redstockings interrupted state legislative hearings on abortion to demand a forum for women to air their concerns.³⁹

Nancy Stearns, a young civil rights attorney at the Center for Constitutional Rights, worked to translate women's protests into constitutional law, particularly in *Abele v. Markle*, a successful pre-*Roe* challenge to Connecticut's abortion laws.⁴⁰ When the *Markle* Court handed down its decision in 1972, it drove home the connection between abortion and equal citizenship between men and women.⁴¹ Concluding that "society now considers women the equal of men," the court held that "[t]he essential requirement of due process is that the woman be given the power to determine within an appropriate period after conception whether or not she wishes to bear a child."⁴²

Generally, however, the abortion-rights movement prioritized arguments thought likely to increase the odds of reform. For example, when in 1969 NARAL presented abortion as a method of birth control, feminist member Lucinda Cisler urged her colleagues to approach their cause in a way that would resonate with powerful allies, particularly those in the population-control movement.⁴³ Similarly, when deciding how to bring a consti-

Leads Group's Challenge to Michigan Anti-Abortion Law, N.Y. TIMES, Oct. 5, 1971, at 28 (Friedan and Geitzer's attempting to reframe the conversation from doctors' rights to women's rights); Letter from Conni Finnerty et al. to NARAL Board of Directors (Aug. 30, 1969) (available in the NARAL Papers, MC 313, Carton 1, Schlesinger Library, Harvard University) (Friedan endorsing abortion-rights protests on Mother's Day).

³⁷ See, e.g., Betty Friedan, *Abortion: A Woman's Civil Right*, in *BEFORE Roe v. Wade*, *supra* note 12, at 38–40.

³⁸ For Beal and Kennedy's essays, see DIANE SCHULDER & FLORYNCE KENNEDY, *ABORTION RAP* (1971); Frances Beal, *Black Women's Manifesto; Double Jeopardy: To Be Black and Female*, in *BEFORE Roe v. Wade*, *supra* note 12, at 52.

³⁹ On the Redstockings protest, see, for example, Edith Evans Asbury, *Women Break Up Abortion Hearing: Shouts for Repeal of Law Force Panel to Move*, N.Y. TIMES, Feb. 14, 1969, at 42. For further discussion of the Redstockings and abortion, see, for example, FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960* 89 (1999); ALICE ECHOLS, *DARING TO BE BAD: RADICAL FEMINISM IN AMERICA 1967–75* 140 (1989).

⁴⁰ See, e.g., SUSAN BROWNMILLER, *IN OUR TIME: MEMOIR OF A REVOLUTION* 111 (2000); Amy Kesselman, *Women Versus Connecticut: Conducting a Statewide Hearing on Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000* 53–56 (Rickie Solinger ed., 1998).

⁴¹ *Abele v. Markle*, 342 F. Supp. 800, 802 (D. Conn. 1972).

⁴² *Id.* at 804.

⁴³ See Memorandum from the NARAL Planning Committee to the NARAL Board of Directors (Sept. 27, 1969) (available in the NARAL Papers, MC 313, Carton 1, Schlesinger Library, Harvard University) (explaining that NARAL should frame its cause in a way that population control groups could support and that NARAL should "lead the way in encouraging many groups to declare that all forms of birth control are useful . . .").

tutional challenge to Michigan's abortion law, the press summarized the view of leading NARAL members that "courts would more easily strike down state anti-abortion laws if the test case were presented in terms of interference with . . . medicine than if it were done on the basis that many women's rights groups have advocated."⁴⁴

B. After Roe, Movement Members Transform the Court's Understanding of Choice

We now associate the Supreme Court's decision with the choice arguments played up by contemporary abortion-rights activists. However, the limited idea of choice so often attacked by scholars did not inevitably emerge after the Court's decision. Indeed, in the mid-1970s, movement members transformed the Court's privacy rhetoric, expressing bold ideas about the relationship between sex equality and fertility control.

Roe itself held that abortion fell under the protection of a right to privacy related to contraception, procreation, marriage, and family formation. Pro-choice activists did not immediately echo the rhetoric of the opinion. Indeed, movement organizations quickly popularized their own interpretations of *Roe*'s holding, emphasizing concerns about equal citizenship.

When narrower ideas of choice gained prominence, abortion-rights activists viewed them as an effective tool in battling political setbacks of the mid-1970s: the passage of federal and state bans on the public funding of abortion and a series of related defeats in the Supreme Court. Choice-based arguments figured centrally in movement efforts to influence electoral politics or to maximize the appeal of legal abortion. Finally, as Reva Siegel and Serena Mayeri have shown, feminists' battle for the Equal Rights Amendment (ERA) to the Constitution—an amendment that would have prohibited discrimination on the basis of sex—eventually discouraged sex-equality arguments for abortion. Fearing that the controversy surrounding abortion would undercut the momentum of the ERA, feminists had another reason for presenting their demands in terms of choice.

The movement's new emphasis on choice rhetoric began with the Court's decisions in *Roe* and *Doe v. Bolton*.⁴⁵ *Roe* involved a Texas statute that prohibited all abortions but those necessary to save the life of the mother.⁴⁶ The *Roe* Court identified two state interests served by abortion bans—those involving the health of the woman and the life of the fetus. On the other side of the ledger, *Roe* claimed, was a "right of privacy . . . broad enough to encompass a woman's decision whether or not to terminate her

⁴⁴ Shanahan, *supra* note 36.

⁴⁵ *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

⁴⁶ *Roe*, 410 U.S. at 117–18. By contrast, *Doe* involved a statute patterned on the American Legal Institute (ALI)'s model reform: the statute allowed abortions subject to particular restrictions, requiring, among other things, several diagnoses by licensed physicians and the subsequent approval of a hospital committee. *Doe*, 410 U.S. at 182 n.4.

pregnancy.”⁴⁷ This right already protected constitutional interests involving marriage, procreation, contraception, and parenting.⁴⁸ Just the same, under *Roe*, women alone could not make the ultimate decision, since both physicians and women had to participate in reaching a solution. Before viability, “the attending physician, in consultation with his patient,” was “free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated.”⁴⁹

In Justice Blackmun’s view, *Roe*’s privacy rhetoric would deescalate conflict about abortion, distracting attention from issues like “population growth, pollution, poverty, and racial overtones [that] tend[ed] to complicate and not to simplify the problem.”⁵⁰ By approaching the abortion issue with “constitutional measurement,” as *Roe* explained, the Court hoped to make its decision “free of emotion and of predilection.”⁵¹ As importantly, privacy rhetoric made the abortion right part of a recognizable constitutional tradition.⁵²

Almost immediately, in the political arena, abortion-rights organizations adopted varying interpretations of the privacy and choice the Supreme Court had spotlighted. In meaningful ways, however, abortion-rights supporters often departed from the language of the *Roe* opinion, describing broader rights more closely connected to women’s needs. For example, NOW at times stressed the importance of “the freedom to choose” without mentioning any interest belonging to physicians.⁵³ Similarly, in a 1973 fundraising letter, the organization described abortion rights as recognizing that “government should not abridge your freedom to choose the size and spacing of your family.”⁵⁴ As NOW described it, the *Roe* decision had recognized a right to choose that went beyond abortion and had little to do with the advice or control of the physician—a right for all women to control child-bearing and child-rearing. As importantly, according to NOW, abor-

⁴⁷ *Roe*, 410 U.S. at 153.

⁴⁸ *See id.* at 152–53.

⁴⁹ *Id.* at 163. On *Roe*’s framing of the issue as one of physicians’ rights, see, for example, Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 85–86 (1995) (“Under *Roe*, the physician . . . is constitutionally required to lead the decisionmaking process.”); Scott Moss & Douglas M. Raines, *The Intriguing Federalist Future of Abortion Rights*, 88 B.U. L. REV. 175, 178 (2008) (describing *Roe*’s “doctor-focused”—rather than woman-focused—justification).

⁵⁰ *Roe*, 410 U.S. at 116.

⁵¹ *Id.*

⁵² *See id.* at 153 (establishing that the abortion right belonged to a larger privacy tradition).

⁵³ *See, e.g.*, Letter from Wilma Scott Heide, President, NOW, to Friends of NOW (n.d., ca. 1973) (available in The Wilma Scott Heide Papers, Box 11, Folder 12, Schlesinger Library, Harvard University).

⁵⁴ Letter from Wilma Scott Heide, President, NOW, to potential donors (n.d., ca. 1973) (available in The Wilma Scott Heide Papers, Box 11, Folder 14, Schlesinger Library, Harvard University).

tion rights belonged to individual women rather than to physicians and patients, regardless of what the Court had held.

Between 1973 and 1977, NOW and NARAL brought to the surface sex-equality arguments only hinted at in the *Roe* decision. In October 1976, for example, NOW began describing *Roe* as a decision based on “the constitutional rights to *equal protection* and to privacy.”⁵⁵ In Congress, NARAL leader Sarah Weddington contended that “women cannot take advantage of [equal] opportunities . . . if they cannot control their fertility.”⁵⁶ In a resolution on reproductive rights, NOW similarly stressed that “a woman’s right to control her body is basic to controlling her life economically, socially, and spiritually.”⁵⁷ A later resolution called for improvements to “the availability of abortion, especially to the poor.”⁵⁸ The resolution also made clear that abortion-rights activists did not inevitably respond to *Roe* by narrowing their demands. Indeed, the resolution committed NOW to fighting sterilization abuse and to demanding legislation guaranteeing sex education, childcare, and prenatal and childbirth care available to all.⁵⁹

In the immediate aftermath of *Roe*, members of groups like NARAL and NOW stressed both choice-based claims and those related to women’s equal citizenship. NOW voted for a resolution setting forth a broad reproductive-justice agenda, and members of both organizations argued for a right to choose belonging to women rather than to physicians and patients. The *Roe* decision did not immediately spark the ascendancy of problematic arguments about a right to choose. After 1973, abortion-rights activists described reproductive rights far more capaciously than those set forth by the Court.

C. *Movement Emphasis on Electoral Politics Increases the Appeal of Choice*

In 1976–1977, the political terrain shifted, encouraging NOW and NARAL to focus on a narrower idea of reproductive choice. The momentum for a redefinition of the abortion-rights cause began in 1976, when Congress passed the Hyde Amendment, a ban on federal Medicaid funding for abortion.⁶⁰ Every year beginning in 1977, abortion-rights activists battled to stop

⁵⁵ Mailing, NOW, “Chronology of Major Events Affecting Women’s Right to Choose Abortion – 2600B.C. – Present” (Oct. 3, 1978) (available in The NOW Papers, MC 496, Box 54, Folder 42, Schlesinger Library, Harvard University) (emphasis added).

⁵⁶ Meeting Minutes, NARAL Executive Committee (Apr. 13, 1975) (available in The Betty Friedan Papers, 71-62-81-M23, Carton 43, Folder 1462, Schlesinger Library, Harvard University).

⁵⁷ NOW Resolution: Reproductive Rights (n.d., ca. 1977) (available in The NOW Papers, MC 496, Box 23, Folder 64, Schlesinger Library, Harvard University).

⁵⁸ NOW Resolution on Reproductive Rights (n.d., ca. 1978) (available in The NOW Papers, MC 496, Box 24, Folder 22, Schlesinger Library, Harvard University).

⁵⁹ *Id.*

⁶⁰ On the Hyde Amendment, see, for example, David E. Rosenbaum, *Congress Approves Curb on Abortions, But Veto Is Likely*, N.Y. TIMES, Sept. 18, 1976, at 1.

the further tightening of narrow exceptions to the Hyde ban.⁶¹ In 1977, the Supreme Court fueled antiabortion interest in the funding issue by upholding several state funding bans.⁶²

In the aftermath of the passage of the Hyde Amendment, abortion-rights activists channeled new energy into electoral politics at the state and federal level. A NARAL press release declared, “[t]he right to choose abortion is under serious attack with recent Congressional and state actions limiting public funding for legal abortion care.”⁶³ As Missouri abortion-rights activists Sylvia Hampton and Donna Jones explained, with the Court’s 1977 decisions upholding bans on state funding for abortion and the proposed constitutional convention for a human life amendment, “the message was clear—the battle would be shifted from the courts to the political arena.”⁶⁴

In 1979, NARAL’s four-day national conference pushed success in electoral politics to the fore. To succeed in electoral politics, NARAL developed messages that made no mention of abortion procedure, sex equality, or welfare rights.⁶⁵ Instead, bumper stickers and public information drives underlined the popularity of choice.⁶⁶ One campaign button, which read “I am Pro-Choice—and I vote,” reflected the supposed power of voters supporting abortion rights.⁶⁷ Karen Mulhauser, then-NARAL Executive Director, elaborated on these arguments in a major NARAL fundraising campaign.⁶⁸ Mulhauser wrote, “Why, you ask, are [abortion opponents] succeeding despite the ruling of the U.S. Supreme Court? The answer is simple: they have frightened and intimidated our political leaders. . . . The battle for liberty is won or lost at the polls, in the legislatures, and in the courts.”⁶⁹ Mulhauser also made apparent the kinds of choice-based claims NARAL would stress in appealing to voters, presenting the struggle as “more than a battle be-

⁶¹ On the yearly struggle to determine the scope of Hyde restrictions, see, for example, Karen De Witt, *Foes of Abortion Seek to Tighten Restrictions on Medicaid Funds*, N.Y. TIMES, Mar. 1, 1979, at B20; Martin Tolchin, *Financing Bill and Abortion: Both Sides Emphasize Question of Conscience*, N.Y. TIMES, Oct. 2, 1980, at A19; Martin Tolchin, *But Now There Is Pressure of Time and Money to Reach Agreement*, N.Y. TIMES, Nov. 27, 1977, at 176.

⁶² *Maher v. Roe*, 432 U.S. 464, 470–78 (1977) (upholding a Connecticut Medicaid funding ban on abortion); *Poelker v. Doe*, 432 U.S. 519, 520–21 (1977) (sustaining a ban on the use of St. Louis public hospitals for abortion); *Beal v. Doe*, 432 U.S. 438, 445–54 (1977) (upholding a Pennsylvania law that limited Medicaid funding for abortions).

⁶³ Press Release, NARAL (June 1978) (available in the Reproductive Health Services Papers, University of Missouri-St. Louis).

⁶⁴ SYLVIA HAMPTON & DONNA J. JONES, REPRODUCTIVE HEALTH SERVICES, INVOLVING SIGNIFICANT OTHERS: HEALTH RIGHTS ADVOCACY PROGRAM GUIDE (1978) (available in the Reproductive Health Services Collection, University of Missouri-St. Louis).

⁶⁵ See, e.g., Leslie Bennetts, *For Pro-Abortion Group, An “Aggressive New Campaign,”* N.Y. TIMES, May 1, 1979, at C22.

⁶⁶ See, e.g., *id.*

⁶⁷ *Id.*

⁶⁸ Letter from Karen Mulhauser, Executive Director of NARAL, to Fellow Citizens (n.d., ca. 1979) (available in the Reproductive Health Services Collection, University of Missouri-St. Louis).

⁶⁹ *Id.*

tween liberal and conservative ideologies,” and as “a test of whether our society will protect the rights of the individual to lead his or her own life, free of the dictates and dogma of others.”⁷⁰

In 1980, the organization reaffirmed the importance of claims involving a right to choose.⁷¹ As part of an initiative called Impact ‘80, NARAL members encouraged politicians to support legal abortion by arguing that a majority of voters demanded it.⁷² By extension, NARAL approached the abortion issue in a way calculated to win the support of an ambivalent public.⁷³ As the *Chicago Tribune* reported in 1980, NARAL had “adopted a less-offensive connection to abortion; it now calls itself ‘pro-choice,’ recognizing that many persons generally opposed to abortion nonetheless believe it is not a government’s prerogative to forbid it.”⁷⁴

NARAL’s choice-based arguments spread throughout the abortion-rights movement. In 1979, in its own fundraising campaign, Planned Parenthood argued: “In the face of the outright attack on the most personal of human rights . . . [w]e must defend the right to choose.”⁷⁵ Nationally, as early as 1978, state abortion-rights organizations held abortion rallies with titles such as “Freedom Is the Right to Choose.”⁷⁶ In October 1979, the national movement organized a major protest event, Abortion Rights Action Week, around the idea of choice. As one mailing promoting the events in Missouri explained, the most important goal was to “work together to show our elected representatives . . . the political reality of the abortion issue—we are the majority, we are pro-choice, AND WE VOTE!”⁷⁷

Activists did not respond solely to the Supreme Court or act only to preserve constitutional protections for abortion. Movement members also reacted to a series of political setbacks. During the 1980 presidential campaign, Ronald Reagan had promised to nominate antiabortion judges to the federal bench,⁷⁸ and the Republican Party Platform endorsed a fetal-life

⁷⁰ *Id.*

⁷¹ See, e.g., Michael Knight, *Drive for Abortion Rights Begins*, N.Y. TIMES, Jan. 23, 1980, at A12; Richard Phillips, *The Shooting War Over ‘Choice’ or ‘Life’ is Beginning Again*, CHI. TRIB., Apr. 20, 1980, at J3.

⁷² See, e.g., Phillips, *supra* note 71.

⁷³ See, e.g., *id.*

⁷⁴ *Id.*

⁷⁵ Letter from Faye Wattleton, President, Planned Parenthood, to Membership (n.d., ca. 1979) (available in the Dr. Joseph Stanton Papers, The Dr. Joseph R. Stanton Human Life Issues Library and Resource Center, Sisters of Life, Bronx, New York).

⁷⁶ Schedule, *Freedom Is the Right to Choose: Rally for Abortion Rights, Reproductive Health Services* (June 1978) (available in the Reproductive Health Services Collection, University of Missouri-St. Louis).

⁷⁷ Statement of Purpose, Abortion Rights Alliance et al., Abortion Rights Action Week (Fall 1978) (available in the Reproductive Health Services Collection, University of Missouri-St. Louis). For similar claims, see, for example, Brochure, American Civil Liberties Union, The ACLU’s Campaign for Choice: The Right of a Woman to Control Her Own Body (n.d., ca. 1978) (available in the Reproductive Health Services Collection, University of Missouri-St. Louis).

⁷⁸ See Stuart Taylor, Jr., *Politics of the Bench: Carter and Reagan Seek Gains From Prospective Judiciary Appointments*, N.Y. TIMES, Oct. 28, 1980, at A27.

amendment.⁷⁹ In 1981, Congress began considering a proposed statute, the human life bill that would recognize fetal personhood under the Fourteenth Amendment.⁸⁰ Shortly thereafter, Senator Orrin Hatch (R-UT) offered a human life amendment that would overrule *Roe* and return the abortion issue to the states.⁸¹ In 1980, the Court upheld the Hyde Amendment, ending any hope that the courts would undo abortion funding bans.⁸²

With abortion rights newly in jeopardy, the abortion-rights movement turned to popular and uncontroversial choice-based claims in trying to rebuild support for abortion rights and reestablish their political influence. Since the 1980 election, as NARAL made such an effort, its membership had increased from 90,000 to 140,000, and the organization had already raised \$400,000 for the 1982 campaign.⁸³ The choice frame played an important part in NARAL's efforts to build grassroots political support in 17 key states.⁸⁴

In the same period, NOW deemphasized the abortion struggle. The organization had also experienced a fundraising surge since the 1980 election, raising \$1.3 million a month since December 1981, the vast majority of which went into the campaign for the ERA.⁸⁵ Since the late 1970s, NOW had worked to separate arguments for abortion and the ERA, fearing that controversial reproductive politics would doom the Amendment's chances of ratification.⁸⁶ This focus created tension between NOW and NARAL; as NARAL leader Nanette Falkenberg explained, NOW's strategy had "caused disagreement with other organizations and . . . caused animosities."⁸⁷ Only after the "new ERA" failed in the House did NOW put greater emphasis on the abor-

⁷⁹ See, e.g., Arthur Siddon and Jon Margolis, *GOP Ignores Plea, Sticks with Its ERA Stand*, CHI. TRIB., Jul. 10, 1980, at 1; Warren Weaver, Jr., *Republicans Also Back Proposed Amendment to Prohibit Abortions*, N.Y. TIMES, Jul. 9, 1980, at A1.

⁸⁰ On the human life bill, see, for example, Joan Beck, *The Pro-Life Groups Turn to Congress on Abortion*, CHI. TRIB., Jan. 30, 1981, at B2; Bernard Weinraub, *Abortion Becoming a Top Priority Issue in Congress*, N.Y. TIMES, Mar. 13, 1981, at A18.

⁸¹ On the Hatch Amendment, see, for example, Leslie Bennetts, *Antiabortion Forces in Disarray Less than a Year After Victories in Election*, N.Y. TIMES, Sept. 22, 1981, at B5 [hereinafter, Bennetts, *Antiabortion Forces*].

⁸² For the Court's decision on this point, see *Harris v. McRae*, 448 U.S. 297 (1980).

⁸³ See Ann Crittenden, *Pro-Abortion Group Sets a Major Political Drive*, N.Y. TIMES, Jun. 14, 1982, at B10.

⁸⁴ See, e.g., *id.*

⁸⁵ See, e.g., Jane Perlez, *NOW's Funds Soar Suggesting Extent of Women's Power*, N.Y. TIMES, May 20, 1982, at C1.

⁸⁶ See, e.g., Serena Mayeri, *A New E.R.A. or a New Era?: Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1274 (2009) ("Opponents' unremitting efforts to derail the amendment on this basis drove many proponents to elide or even deny the connection despite their firm conviction that reproductive freedom and sex equality were inextricably intertwined."); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L. J. 815, 827 (2007) ("In this period, sex equality arguments for the abortion right were extinguished politically in the fight over the Equal Rights Amendment.").

⁸⁷ Perlez, *supra* note 85.

tion issue, focusing on the opposition's flaws.⁸⁸ For example, Judy Goldsmith, then-President of NOW, stressed the violence associated with the antiabortion fringe.⁸⁹ In an appearance before the National Press Club in Washington, D.C. in February of 1985, Goldsmith said, "'Terrorism is not acceptable under any circumstances. . . . We will not back down to bullies using terrorist tactics, and we will not simply yield the clinics to these people.'" ⁹⁰

D. *The Movement Downplays Choice Arguments in an Effort to De-Stigmatize Abortion*

By 1985, recent political developments led activists to reconsider the efficacy of conventional arguments based on the idea of a right to choose. In 1983, Reagan nominee Sandra Day O'Connor attacked the reasoning of the *Roe* Court, increasing the antiabortion movement's interest in reshaping the courts.⁹¹ In 1984, Reagan, an avowed enemy of the abortion-rights movement, easily won reelection, making seemingly inevitable the nomination of another antiabortion justice.⁹² The antiabortion movement itself developed a powerful new weapon, a 28-minute film, "Silent Scream," narrated by former NARAL leader Bernard Nathanson.⁹³ In the film, Nathanson describes images taken from an ultrasound of the abortion of a 12-week-old fetus.⁹⁴ The film attracted the attention of the Reagan Administration and proved to

⁸⁸ On the failure of the new ERA, see, for example, Susan Bennett, "New" ERA Downed in House, PHILA. DAILY INQ., Nov. 16, 1983, 1983 WLNR 75568; Susan Trausch, ERA Supporters Say Fight Will Continue, BOS. GLOBE, Nov. 16, 1983, 1983 WLNR 56099. For NOW's arguments of this kind, see, for example, George E. Curry, Falwell, NOW Clash in Abortion Debate, CHI. TRIB., Feb. 13, 1985, at 5; Ken Fireman, NOW Plans 25 Vigils on Weekend to Halt Violence at Abortion Clinics, PHILA. DAILY INQ., Jan. 18, 1985, 1985 WLNR 224214; Joyce Gemperlein, NOW: Reagan Fueling Antiabortion Attacks, PHILA. DAILY INQ., Mar. 16, 1984, 1984 WLNR 178080. For an excellent overview of the struggle for the "new ERA," see generally Mayeri, *supra* note 86.

⁸⁹ See Curry, *supra* note 88.

⁹⁰ *Id.*

⁹¹ For O'Connor's opinion in *Akron I*, see *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting) ("Even assuming that there is a fundamental right to terminate pregnancy in some situations, there is no justification in law or logic for the trimester framework adopted in *Roe* and employed by the Court today on the basis of *stare decisis*."). On O'Connor's shifting pro-life perceptions, see generally TRIBE, *supra* note 14, at 167.

⁹² On Reagan's support for the antiabortion movement during and after the 1984 election, see, for example, JAMES HAROLD FARNEY, SOCIAL CONSERVATIVES AND PARTY POLITICS IN CANADA AND THE UNITED STATES 55 (2012); Margaret Ross Sammon, *The Politics of the U.S. Catholic Bishops: The Centrality of Abortion, in CATHOLICS AND POLITICS: THE DYNAMIC TENSION BETWEEN FAITH AND POWER* 11, 18 (2008).

⁹³ On "Silent Scream," see, for example, Dena Kleiman, *Debate on Abortion Focuses on Graphic Film*, N.Y. TIMES, Jan. 25, 1985, at B8.

⁹⁴ See Betty Cuniberti & Elizabeth Mehren, 'Silent Scream' Abortion Film Stirs Friend, Foe, L.A. TIMES, Aug. 8, 1985, at A1.

be a media sensation.⁹⁵ In the courts, in politics, and in the media, abortion rights seemed more at risk than ever.

These setbacks prompted movement leaders to reconsider the value of choice-based arguments. The movement's emphasis on choice, calculated to sway elections, had done little to stall the momentum of Ronald Reagan and other candidates opposed to abortion. Choice-based arguments did not seem to undercut the new, multimedia fetal-rights claims so successfully promoted by abortion opponents in the mid-1980s. Pro-choice activists experimented with emphasizing the way that abortion had benefitted real women rather than abstract values of choice and freedom. The movement's new rhetoric drew new attention to the intersection of reproductive rights, sex discrimination, racial bias, and poverty.

Efforts to reformulate the movement's arguments began at a February 1985 meeting, when NARAL members agreed that the movement "need[ed] to find new ways to articulate the right to choose abortion."⁹⁶ As a solution, as NARAL explained in a strategy memorandum entitled "Impact of Focus on Women Strategy Weekend on 'Silent No More,'" the organization revived what had made abortion rights activists successful in the 1970s: efforts to de-stigmatize abortion and to stress the connections not only between abortion and autonomy but also between abortion and race and sex equality.⁹⁷ The memorandum explained that "the right to abortion was won in large part because women began to speak out about abortion, to say 'we are your mothers, daughters, and sisters, and we are the ones having illegal abortions.'"⁹⁸ After 1973, the memorandum asserted, women no longer spoke out, and "the silence left us vulnerable to attack and reinforced old feelings of guilt and shame."⁹⁹

"Silent No More," the campaign that resulted from this effort, departed significantly from previous choice-based claims. NARAL, NOW, and Planned Parenthood solicited 40,000 letters from men and women who had experiences with abortion.¹⁰⁰ The letters did not defend the importance of

⁹⁵ See, e.g., *id.*

⁹⁶ Memorandum, NARAL, Abortion Rights: Silent No More (n.d., ca.1985). On the date and early discussion of the Silent No More Campaign, see Memorandum, "Focus on Women" Campaign and "Abortion Rights Silent No More" Action, Nanette Falkenberg to NARAL Affiliates (Feb. 27, 1985) (available in the NARAL Pro-Choice Massachusetts Papers, Schlesinger Library, Harvard University).

⁹⁷ Memorandum, Impact of Focus on Women Strategy Weekend on "Silent No More," (Apr. 29, 1985) (available in the NARAL Pro-Choice Massachusetts Papers, Box 16, Folder 14, Schlesinger Library, Harvard University).

⁹⁸ *Id.* (internal quotation mark omitted).

⁹⁹ *Id.* For further discussion of the "Silent No More Campaign," see, for example, Statement, NARAL, Abortion Rights: Silent No More, Overall Goals, Themes, and Approaches (Feb. 1985) (available in the NARAL Pro-Choice Massachusetts Papers, Box 16, Folder 14, Schlesinger Library, Harvard University) (explaining the organization's interest in "chang[ing] the message of the pro-choice movement to include an increased emphasis on women, and to make a personal emotional connection to the need for choice").

¹⁰⁰ See Cuniberti & Mehren, *supra* note 94.

choice, freedom, or privacy in the abstract. Instead, the letters provided widely varied and deeply personal stories about “positive feelings about abortion” and other “positive things [that could] result [from it].”¹⁰¹

The letters NARAL accumulated called for a broader reproductive justice agenda. First, women of color wrote to explain that it was “very hard to talk about ‘choice’ when there isn’t money, [. . .] when racism pervades every aspect of life.”¹⁰² The letters encouraged NARAL leaders to “view abortion as part of a larger struggle—a struggle to create a world in which economic and social circumstances allow women to truly have choice both to avoid unwanted pregnancy and to have wanted children that will be cared for.”¹⁰³ At the same time, “Silent No More” would allow activists to make abortion more visible and to make discussion of the procedure more nuanced—to serve as a reminder of the fact that “the 1.5 million women who have abortions each year are much more than faceless, nameless human beings. They are individuals who are important in our lives.”¹⁰⁴ NARAL encouraged members not to “focus only on the hardship cases” or to describe abortion as a “tragedy.”¹⁰⁵ Instead, the program would legitimate the very idea of abortion, convincing the “American people that every woman who chooses to have an abortion does so for reasons that are compelling”¹⁰⁶

“Silent No More,” like the choice-based arguments, reflected movement interest in increasing public support for abortion. Of course, the “Silent No More” campaign more closely resembled an equality frame than had earlier claims made by NARAL earlier in the 1980s. As part of the program, NARAL members openly discussed important, but often uncomfortable, issues: the intersection of race, poverty, and lack of access to reproductive health care choice.¹⁰⁷ However, this shift in message came because NARAL leaders believed that “Silent No More” would be more politically effective than either the privacy rhetoric set out in *Roe* or the choice-based understanding of it forged by movement members. In a memo designed to guide responses to questions from the media, NARAL suggested the following sample answer: “[t]he majority of people in this country are pro-choice. We

¹⁰¹ Kay Mills, *Pro-Choice Advocates Deliver a Different Message on Abortion*, L.A. TIMES, Jun. 2, 1985, at E3. For further discussion, see, for example, Dudley Clendinen, *The Veterans of Abortion Fight Back by Speaking Up*, N.Y. TIMES, May 26, 1985, at E5; Ellen Goodman, *Abortion Supporters Stand to Be Counted*, CHI. TRIB., May 24, 1985, at A1.

¹⁰² Memorandum, Impact of Focus on Women Strategy Weekend, *supra* note 97.

¹⁰³ *Id.*

¹⁰⁴ Press Release, NARAL, “ABORTION RIGHTS: Silent No More” (Mar. 20, 1985) (available in the NARAL Pro-Choice Massachusetts Papers, Box 16, Folder 14, Schlesinger Library, Harvard Library).

¹⁰⁵ Memorandum from Nanette Falkenberg, Executive Director, NARAL, to NARAL Leadership (n.d., ca. May 1985) (available in the NARAL Pro-Choice Massachusetts Papers, Box 16, Folder 14, Schlesinger Library, Harvard Library).

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., Memorandum, Impact of Focus on Women’s Strategy Weekend, *supra* note 97.

want to be certain that *when* the Court reviews *Roe* that the majority is visible and that the climate in this country is clearly pro-choice. ‘Silent No More’ is the first step in making that happen.”¹⁰⁸

NOW used a similar approach in the aftermath of a bitter leadership struggle. In the middle of the “Silent No More” campaign, Eleanor Smeal, a former NOW President, challenged Judy Goldsmith for the NOW Presidency, claiming that members wanted the group to be more outspoken and active. Both Smeal and Goldsmith, however, agreed that abortion should be “the bottom-line fight in the women’s rights struggle.”¹⁰⁹

When Smeal emerged victorious, NOW forged an argumentative strategy that somewhat resembled the “Silent No More” campaign. In 1986, Smeal, who favored more direct-action protest, led the first “March for Women’s Lives.”¹¹⁰ The event was designed to demonstrate to politicians that a majority of Americans favored legal abortion.¹¹¹ In addition to creating an advantage in what Smeal called “the numbers game,” the march drew on the kind of equality-based, personalized claims tied to “Silent No More.”¹¹² At the event, for example, feminist Gloria Steinem, a featured speaker, argued: “The desire to control the production of children is the definition of the patriarchal structure.”¹¹³ Smeal echoed these concerns, asserting: “You cannot sacrifice women on the altar of self-righteousness.”¹¹⁴

Between 1987 and 1993, as the political terrain shifted again, the movement largely abandoned the arguments used as part of the “Silent No More” campaign, instead updating narrower, choice-based contentions. In 1989, a plurality on the Supreme Court, in *Webster v. Reproductive Health Services*, criticized *Roe*’s trimester framework,¹¹⁵ and some commentators predicted

¹⁰⁸ Memorandum from Nanette Falkenberg, Executive Director, NARAL, to NARAL Leadership, “How to Answer Questions from The Media” (n.d., ca. 1985) (available in the NARAL Pro-Choice Massachusetts Papers, Box 16, Folder 14, Schlesinger Library, Harvard University).

¹⁰⁹ Kay Longcope, *NOW Launches Abortion Rights Campaign on Eve of Leadership Vote*, BOS. GLOBE, Jul. 20, 1985, 1985 WLNR 139018; *see also Candidates for NOW Presidency Clash*, WICHITA EAGLE, Jul. 21, 1985, 1985 WLNR 1177126.

¹¹⁰ On the March for Women’s Lives, *see*, for example, *80,000 Demonstrate for Abortion Rights*, CHI. TRIB., Mar. 10, 1986, at 3; Jane Meredith Adams, *85,000 March to Support Right of Choice in Abortion, Birth Control*, BOS. GLOBE, March 10, 1986, 1986 WLNR 299729; Jonathon Feurbringer, *80,000 in March to Capitol to Back Right to Abortion*, N.Y. TIMES, Mar. 10, 1986, at A1; Dick Polman, *Abortion Rights Advocates Take Their Cause to The Street*, PHILA. DAILY INQ., Mar. 11, 1986, http://articles.philly.com/1986-03-11/entertainment/26085434_1_abortion-bus-women-president, archived at <http://perma.cc/3AFQ-6U85>.

¹¹¹ *See 80,000 Demonstrate for Abortion Rights*, *supra* note 110 (referring to claims made at the march about the existence of an abortion-rights majority).

¹¹² *See id.*

¹¹³ Adams, *supra* note 110

¹¹⁴ *Id.*

¹¹⁵ 492 U.S. 490, 502–22 (1989).

that the Justices would soon overrule the 1973 opinion.¹¹⁶ For the abortion-rights movement, *Webster* confirmed the appeal of political strategies for protecting abortion rights.¹¹⁷ In 1992, this intuition seemed correct, as abortion-rights supporters took control of Congress and the White House.¹¹⁸ Activists went so far as to promote a bill in Congress that would create far-reaching protections for abortion rights.¹¹⁹ As the movement emphasized electoral and legislative solutions, choice-based arguments, believed to have wide appeal, became more strategically significant.

In 1987, NARAL first began turning back to conventional choice-based contentions.¹²⁰ Organization leaders noted growing public fatigue with the abortion issue and increased competition for money and supporters with other pro-choice groups.¹²¹ As importantly, NARAL members predicted that the 1988 election season would bring to power a more moderate group of leaders open to arguments for abortion rights.¹²² In order to appeal to this moderate audience, the organization developed a new message and a strategic plan that would be implemented in the next six years.¹²³ Under the circumstances, choice contentions had a practical appeal. If the movement had to reason with political leaders and voters ambivalent about abortion, choice-based contentions seemed advantageous.

E. The Battle for the Freedom of Choice Act Narrows Activists' Choice Arguments

After 1989, when the Supreme Court decided the constitutionality of a Missouri antiabortion statute, movement members had an additional reason to highlight the importance of choice: the struggle for federal statutory protections. The Supreme Court's September 1989 decision in *Webster* upheld parts of a restrictive Missouri law, and five Justices openly criticized *Roe*'s trimester framework.¹²⁴ *Webster* convinced the movement that it could no longer count on the Court to safeguard abortion rights. For instance, Sharon Rodine of the National Women's Political Caucus said in September 1989 that *Webster* "proved . . . [that] the only real protection for women's repro-

¹¹⁶ See Mary Ziegler, *Ways to Change: A Reevaluation of Article V Campaigns and Legislative Constitutionalism*, 2009 B.Y.U. L. REV. 969, 994 (2009) [hereinafter Ziegler, *Ways to Change*].

¹¹⁷ See, e.g., Saletan, *supra* note 12, at 222.

¹¹⁸ See e.g., *id.*

¹¹⁹ See e.g., *id.*

¹²⁰ See, e.g., NARAL, Six-Year Strategic Plan (Mar. 12, 1987) (available in the NARAL Pro-Choice Massachusetts Papers, Box 28, Folder 15, Schlesinger Library, Harvard University).

¹²¹ See, e.g., *id.*

¹²² See, e.g., *id.*

¹²³ See, e.g., *id.*

¹²⁴ 492 U.S. at 502–22.

ductive rights [was] political power.”¹²⁵ A reinterpretation of *Roe*—one based on rights for women and the importance of freedom of choice—became a tool for rallying voters and members of Congress seeking to create federal statutory protections of abortion rights.¹²⁶ First proposed in 1989, the federal Freedom of Choice Act (FOCA) prohibited any state from restricting “the right of a woman to choose to terminate a pregnancy” prior to viability, or at any time “if such termination is necessary to protect the health life or the health of the woman.”¹²⁷ While opponents disputed its precise impact, FOCA’s supporters claimed that it would codify the result of *Roe*, prohibiting regulations that the *Roe* Court would have struck down and allowing restrictions that it would have upheld.¹²⁸ At a minimum, FOCA would have prevented the states from introducing abortion restrictions already rejected by the Court.¹²⁹

The question became how best to promote FOCA. After conducting polls and focus groups on which message would resonate most with voters, NARAL settled on “Who Decides.”¹³⁰ A journalist wrote, “the new theme is that the battle over the legality of abortion is less about abortion itself than over whether the government will decide who can have one.”¹³¹

As then-NARAL President Kate Michelman explained at a strategy session, the “key” idea was “individ[idual] decisionmaking.”¹³² Focusing on choice and autonomy would educate the public about NARAL’s values: an interest in “autonomy/free + informed consent,” the “protection of the vulnerable incapable of making decisions,” and “justice + fairness.”¹³³ But as NARAL consultant Gina Glantz explained, there was “more of an acceptance” of approaches spotlighting “responsible decision-making.”¹³⁴ By con-

¹²⁵ See Ziegler, *Ways to Change*, *supra* note 116 (quoting statement of Sharon Rodine, National Women’s Political Caucus (Sept. 6, 1989) available in The NOW Papers (MC 496, Box 91, Folder 25, Schlesinger Library, Harvard University).

¹²⁶ See, e.g., *id.*

¹²⁷ The Freedom of Choice Act of 1989, S. 1912, 101st Cong. § 2(a) (1989), *archived at* <http://perma.cc/6AKV-8CNG>.

¹²⁸ On the debate about FOCA’s impact, see, for example, Robert Eckert, Letter to the Editor, *Abortion Rights Law Wouldn’t Work Anyway; Parties and Justices*, N.Y. TIMES, Aug. 14, 1992, 1992 WLNR 3272786 (arguing that “the effect of a freedom of choice act would be that a woman’s ‘right’ to choose abortion would be at the sufferance of a temporary majority in Congress”); Laura Mecoy, *Abortion-Rights Bill Unveiled: Cranston-Mitchell Plan Anticipates Adverse Ruling*, SACRAMENTO BEE, June 26, 1992, 1992 WLNR 4466314.

¹²⁹ See, e.g., Tony Mauro & Mimi Hall, A “Setback” for *Abortion Rights*, U.S.A. TODAY, Dec. 8, 1992, 1992 WLNR 2227216 (describing FOCA as “a measure that would sharply limit states’ ability to restrict abortion”).

¹³⁰ For a comprehensive discussion of “Who Decides,” see generally Saletan, *supra* note 12.

¹³¹ Dionne, *supra* note 15.

¹³² Handwritten Notes, NARAL Strategy Meeting (n.d., ca. 1993) (available in the NARAL Pro-Choice Massachusetts Papers, Box 28, Folder 15, Schlesinger Library, Harvard University) (discussing messaging).

¹³³ *Id.*

¹³⁴ *Id.*

trast, focusing on socioeconomic equality or fairness often proved challenging. “[P]eople don’t want to pay for so many abortions,” Glantz reasoned.¹³⁵ “Who Decides” and the choice framework became models of movement success.¹³⁶ As NARAL leaders later explained, the campaign was “considered to be the single most effective and enduring message generated by the reproductive rights movement.”¹³⁷

Again, the emphasis put on choice-based arguments reflected the changing political opportunities available to the abortion-rights movement. During the battle to introduce statutory protections for abortion, NARAL and other pro-choice groups had political reasons to argue that FOCA would not dramatically change the current legislative landscape. In January 1990, when pro-choice activists set out a strategy for passing FOCA, abortion opponents described the statute as “sweeping” and worried that it would create entitlements to government support.¹³⁸ Don Johnson of the National Right to Life Committee (NRLC), the largest national antiabortion organization, contended that it was “not clear that some of the very minimal regulations that have survived *Roe v. Wade* would continue to survive” if FOCA were to pass.¹³⁹ For Johnson, *Roe* represented the political and legal status quo—one in which the states had power to pass some reasonable restrictions on abortion. He suggested that FOCA created rights broader than those recognized by the *Roe* Court.¹⁴⁰

Pro-choice activists generally responded that FOCA would at most codify *Roe*, thereby allowing states some room to regulate abortion. Senator Don Edwards (D-CA), a chief proponent of FOCA in Congress, argued that *Roe*’s “central holding is the constitutional right of a woman to have an abortion prior to viability.”¹⁴¹ Kate Michelman of NARAL also insisted that FOCA was not “a radical bill that goes farther than *Roe v. Wade*.”¹⁴²

The FOCA battle forced members of the abortion-rights movement to balance ideological commitments and political pragmatism—a task that ultimately divided supporters of legal abortion.¹⁴³ On the one hand, supporters

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ Mailing, NARAL and NARAL Foundation’s Expanded Reproductive Health Agenda (n.d., ca. 1993) (available in the NARAL Pro-Choice Massachusetts Papers, Box 28, Folder 15, Schlesinger Library, Harvard University).

¹³⁸ *See, e.g.,* Dan Balz, *Abortion-Rights Strategy: A Move to Thwart States*, WASH. POST, Jan. 23, 1990, at A23.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Don Edwards, *Why We Need the Freedom of Choice Act*, WASH. POST, May 23, 1993, at C7 (internal quotations omitted).

¹⁴² Kate Michelman, *Unwarranted Interference*, WASH. POST, July 19, 1993, at A15.

¹⁴³ *See, e.g.,* Kevin Merida, *House Judiciary Panel Advances Bill to Ban Most State Curbs on Abortion*, WASH. POST, May 20, 1993, at A8 (“Some Democratic leaders have been . . . frustrated that abortion rights advocates have not been able to work out compromises that could help ensure the bill’s passage.”) (“There will be Democratic and Republican, moderate and conservative supporters and opponents of FOCA, depending on how the bill is worded.”).

of FOCA were disappointed that it did not address the gaps in the Court's abortion jurisprudence, particularly those involving the rights of poor and minority women. Senator Carol Moseley-Braun (D-IL) withdrew her support for the bill, stating "I am concerned the bill allows the states to discriminate against young and poor women seeking an abortion. . . . I cannot support a bill that trades off the rights of some women for the promise of rights for others."¹⁴⁴ In July 1993, when the House voted 255-178 in favor of a restrictive version of the Hyde Amendment, Kim Gandy of NOW asserted that FOCA would "compromis[e] the rights of young women and poor women and rural women."¹⁴⁵ By 1993, NOW, the ACLU, and the National Black Women's Health Project had promised to oppose any version of FOCA that allowed for bans on public funding for abortion or laws requiring parental consultation.¹⁴⁶

On the other hand, some movement members recognized that they might have to accept an imperfect version of the bill to win key congressional votes.¹⁴⁷ "[G]iven the political climate and the makeup of the Senate and the House," argued Kate Michelman of NARAL, "you gain what you can gain, and you build on that."¹⁴⁸ Choice-based arguments appeared more likely to achieve this goal than contentions involving the rights of poor, often non-white women. As the FOCA debate reflected, political leaders remained ambivalent about the idea of welfare rights. By contrast, a philosophy of individualism promised to win the support of legislators who did not strongly support abortion rights.

The divisions plaguing the abortion-rights movement helped to doom the statute.¹⁴⁹ Notwithstanding FOCA's failure, NARAL continued emphasizing choice-based contentions, albeit for different reasons. It seemed that the opposition had successfully stigmatized the abortion procedure. In response, rather than highlighting the benefits of legal abortion, NARAL promoted a "broad program of reproductive health" and a goal of making abortion "less necessary."¹⁵⁰ NARAL's new rhetorical agenda emphasized that every woman should be guaranteed the right "to make personal decisions regarding a full range of reproductive choices, including preventing

¹⁴⁴ Jon Sawyer, *Moseley-Braun Rejects Abortion-Rights Bill*, ST. LOUIS POST DISPATCH, July 10, 1993, at 1B.

¹⁴⁵ Karen Schneider, *Proposed Law Splits Pro-Choice Camp*, PHILA. DAILY INQ., July 18, 1993, 1993 WLNR 1987022.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., Michael Kinsley, *Between Bork and 'Roe': Toward a Democratically Enacted Choice Law*, WASH. POST, Nov. 20, 1992, 1992 WLNR 5561583 (conceding that "[e]nacting the Freedom of Choice law will involve debate and compromise over matters such as parental notification, a waiting period, late abortions and so on"); Schneider, *supra* note 145.

¹⁴⁸ Schneider, *supra* note 145.

¹⁴⁹ On the failure of FOCA, see, for example, Ziegler, *Ways to Change*, *supra* note 116, at 999-1000.

¹⁵⁰ Memorandum, NARAL, NARAL and the NARAL Foundation's Expanded Reproductive Health Agenda (n.d., ca. 1993).

unintended pregnancy, bearing healthy children, and choosing legal abortion.”¹⁵¹

“Real Choices” reflected the stigma attached to abortion while reaffirming the movement’s faith in choice arguments. In expanding its reform platform, NARAL portrayed its goal as the protection of an abstract form of choice. This new strategy reflected popular discomfort with the idea of abortion. While recognizing the need for a broader agenda, “Real Choices” described abortion as both a fundamental right and a trauma most women wanted to avoid. Abortion politics, at least as much as constitutional law, ensured the prominence of these arguments.

As we shall see, in the later years of the Clinton presidency, the momentum for FOCA faded, and abortion opponents began a long and public push for a federal ban on a particular late-term procedure, intact dilation and extraction (intact D&E), popularly labeled “partial-birth abortion.”¹⁵² The partial-birth abortion struggle intensified at a time when an abortion opponent occupied the White House and the Supreme Court seemed increasingly hostile to abortion. Moreover, the years between 1992 and 2004 witnessed the creation of a powerful, new justification for state interference in women’s reproductive decision-making that came to the forefront of political debate. The focus on “partial-birth abortion” allowed abortion opponents to argue forcefully that women needed protection against their own bad decisions.

For the pro-choice movement, the years after 1992 were marked by an increased hostility to abortion rights in the political and judicial arenas. Faced with increased opposition, NARAL emphasized choice-based arguments believed to enjoy a relatively high degree of popular support. As the public seemed more opposed to late-term abortion, activists again highlighted the issue of choice instead of explaining the need for particular procedures, as the next section will show.

F. Responding to a Resurgent Pro-Life Movement, Activists Favor Choice-Based Claims

In 1992, the abortion-rights movement faced another setback when *Planned Parenthood v. Casey* abandoned *Roe*’s trimester framework in favor of a much less protective undue burden test.¹⁵³ While *Casey* had a devastating impact on the abortion-rights movement’s ability to fight state-level restrictions, the Court’s opinion offered a rhetorical framework that worried pro-lifers, placing unprecedented emphasis on the connection between fertility control and equal citizenship and explaining that the State could “not, [in the abortion context,] insist, without more, upon its own vision of the wo-

¹⁵¹ *Id.*

¹⁵² This Section later explores the history of the Partial-Birth Abortion Act in greater depth.

¹⁵³ 505 U.S. 833, 873 (1992) (plurality opinion).

man's role."¹⁵⁴ *Casey* played into a fear already expressed by some abortion opponents: the pro-life movement had lost ground because the public believed it to be anti-woman. For example, prominent abortion opponent John Willke argued that the public ignored the antiabortion message "because they didn't think we were compassionate to women."¹⁵⁵ In an effort to appear sympathetic to women, pro-lifers pushed bans on intact D&E abortions, contending that these procedures psychologically scarred the women who chose them.¹⁵⁶ In Congress and the states, the campaign against "partial-birth abortion" created new problems for an abortion-rights movement already struggling to adapt to the post-*Casey* constitutional landscape.¹⁵⁷

Beginning in 1996, the NRLC and other antiabortion groups began pushing for federal legislation banning the late term abortion procedure known as intact dilation and extraction.¹⁵⁸ The impetus for the campaign came in 1992, when an abortion opponent infiltrated the national conference held by the National Abortion Federation (NAF).¹⁵⁹ *Life Advocate*, an antiabortion newsletter, published images and text from a speech given at the NAF Conference about the procedure.¹⁶⁰ Leaders of the NRLC took the article to Representative Charles Canady (R-FL), a leading opponent of abortion in Congress, who helped them coin the term "partial birth abortion."¹⁶¹

Congress passed laws against the procedure in 1996 and 1998 before then-President Bill Clinton vetoed the measure each time.¹⁶² Focusing on abortion procedures, particularly those performed late in a woman's pregnancy, seemed to do short-term political damage to the abortion-rights

¹⁵⁴ *Id.* at 852.

¹⁵⁵ John Willke & Barbara Willke, *Why Can't We Love Them Both?*, Remarks at the Seventh University Faculty for Life Conference (June 1997), transcript archived at <http://perma.cc/5CVW-XLH3>.

¹⁵⁶ On the connection between partial-birth abortion and woman-protection antiabortion arguments, see, for example, Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694, 1716–32 (2008).

¹⁵⁷ James Bopp and Richard Coleson would later argue that "[t]he debate over partial-birth abortion has furthered this strategy [of framing the abortion issue to the pro-life movement's advantage] because it has forced the pro-abortion camp to publicly defend a particularly visible and gruesome practice." Memorandum from James Bopp, Jr. & Richard E. Coleson to Whom It May Concern (Aug. 7, 2007), archived at <http://perma.cc/V5G2-TKJV>.

¹⁵⁸ On the movement for such a ban in the mid-1990s, see, for example, Neil A. Lewis, *Abortion Foes Rally in Capitol To Urge Changes in the Law*, *N.Y. TIMES*, Jan. 23, 1996, at B8; Robert Pear, *House Votes Ban on a Method Used in Late Abortions*, *N.Y. TIMES*, Mar. 28, 1996, at A1.

¹⁵⁹ See, e.g., Cynthia Gorney, *Gambling on Abortion: Why Both Sides Think They Have Everything to Lose*, *HARPER'S BAZAAR*, Nov. 1, 2004, 2004 *WLNR* 22620830.

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² On the vetoes, see, for example, Katharine Q. Seelye, *Veto Sustained on Bill to Ban Some Abortions*, *N.Y. TIMES*, Sept. 19, 1998, at A1; Robin Toner, *A Veto, A Condemnation, and Possible Political Fallout*, *N.Y. TIMES*, Apr. 22, 1996, at B7.

movement. A 1996 Gallup Poll found that over 50% of respondents favored a so-called partial-birth abortion ban.¹⁶³

In the midst of the partial-birth abortion struggle, political opportunities and poll data convinced abortion-rights activists to stress choice rather than more controversial claims about welfare rights or the need for legal late-term abortions.¹⁶⁴ In August 1999, NARAL held a strategy conference focused on the latest abortion poll data. The polls showed that most Americans reacted favorably to arguments emphasizing “[s]ex education” and the “mitigating factors that make abortion a reasonable option,” including threats to the “life or health of the mother, rape [or] incest.”¹⁶⁵ As importantly, the public favored arguments about “[l]ibertarian values,” claims that choice was “a mainstream American Value,” and that the abortion-rights movement dealt “with more than a single issue.”¹⁶⁶

G. *The Partial-Birth Abortion War and Generational Turnover Solidify Choice Arguments*

In 2000, with the election of George W. Bush, the abortion-rights movement faced a new series of obstacles. By 2003, Bush had signed the Partial-Birth Abortion Act into law, and Congress pushed measures protecting unborn victims of crime and revoking FDA approval of RU 486, an emergency contraceptive.¹⁶⁷ In responding to these developments, NARAL confirmed its emphasis on choice-based arguments. In January 2003, for example, NARAL renamed itself “NARAL Pro Choice America.”¹⁶⁸ As Kate Michelman explained: “Through our name change we are underscoring that our country is pro-choice.”¹⁶⁹ As it had in the late 1970s, NARAL responded to setbacks by working to convince politicians of the political value of abortion and to persuade voters that a broader and more abstract freedom of choice, not abortion, was the primary issue at stake. In this context, privacy or choice-based claims served a political purpose, drawing attention away from a stigmatized abortion procedure. Again, political circumstances, not just constitutional law, shaped NARAL’s strategy.

In a difficult political climate, the movement also deemphasized the abortion issue, playing up less controversial reproductive issues like contra-

¹⁶³ Lydia Saad, *Americans Agree with Banning “Partial-Birth Abortion”*, GALLUP (November 6, 2003), <http://www.gallup.com/poll/9658/americans-agree-banning-partial-birth-abortion.aspx> archived at <http://perma.cc/U8QX-7VUK>.

¹⁶⁴ See, e.g., Meeting Notes, NARAL, NARAL Conference: Expanding CHOICE for America (Aug. 27–29, 1999) (available in the NARAL Pro-Choice Massachusetts Papers, Box 49, Folder 1, Schlesinger Library, Harvard University).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., ALESHA DOAN, OPPOSITION & INTIMIDATION: THE ABORTION WARS & STRATEGIES OF POLITICAL HARASSMENT 98–102 (2007).

¹⁶⁸ Jennifer Lee, *Abortion Rights Group Plans a New Focus and a New Name*, N.Y. TIMES, Jan. 5, 2003, at L19.

¹⁶⁹ *Id.*

ception.¹⁷⁰ This shift, however, came in response to antiabortion victories in the early 2000s: the signing into law of the federal Partial Birth Abortion Act, changing poll numbers indicating a loss of support for the pro-choice movement, and challenges in recruiting younger advocates to the cause.¹⁷¹ In April 2004, in responding to these setbacks, abortion-rights groups organized another March for Women's Lives, the first since 1992.¹⁷² The march echoed the choice-based message the movement had prioritized in the late 1970s. A NARAL leader, for example, asserted that "[m]ost Americans support a woman's right to choose."¹⁷³ To build a majority, however, NARAL would focus "on privacy and access to a range of reproductive services, not just abortion."¹⁷⁴

In 2005, NARAL and other reproductive-rights organizations reinforced this message after conducting the Heartland Tour, an effort to poll state affiliates and voters about the efficacy of different arguments for reproductive justice.¹⁷⁵ The conclusion taken from this effort, as Nancy Keenan of NARAL explained, was that "[p]rochoice advocates must not only communicate their opposition to [antiabortion] attacks but also convey what policies they support."¹⁷⁶ As Keenan explained, a broader reproductive justice agenda would "contextualize abortion within a continuum of women's health care needs."¹⁷⁷ These arguments gained influence between 2006 and 2008, as South Dakota passed a far-reaching ban on abortion¹⁷⁸ and the Supreme Court upheld the federal Partial-Birth Abortion Act of 2003 in *Gonzales v. Carhart*.¹⁷⁹ Health-based claims also appeared more likely to appeal to the younger Americans the abortion-rights movement so desperately wanted to reach.

Antiabortion organizations had been experimenting with ways to reach younger recruits since the 1990s.¹⁸⁰ Groups like Feminists for Life and Students for Life began operating on college campuses.¹⁸¹ These efforts seemed

¹⁷⁰ See, e.g., Robin Toner, *Abortion Rights Marchers Vow to Fight Another Bush Term*, N.Y. TIMES, Apr. 26, 2004, at A1.

¹⁷¹ See *id.*; Sarah Kliff, *A New Generation Awakening*, JOURNAL GAZETTE, Feb. 10, 2012, 2012 WLNR 3129518.

¹⁷² See *id.*

¹⁷³ Robin Toner, *A Call to Arms by Abortion Rights Groups*, N.Y. TIMES, Apr. 22, 2004, at A20.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., Nancy Keenan, *Going Positive on Prevention*, CONSCIENCE, Dec. 22, 2006, at 25, available at ProQuest 195120037.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ On the South Dakota abortion ban, see, for example, Monica Davey, *South Dakota Bans Abortion, Setting Up Battle*, N.Y. TIMES, Mar. 7, 2006, at A1.

¹⁷⁹ 550 U.S. 124 (2007).

¹⁸⁰ For examples of these efforts, see *Feminists for Life Targeting Colleges*, WASH. TIMES, Oct. 31, 1996, 1996 WLNR 361040; Melissa Healy, *Feminists for Life Keys on Prevention, Not Abortion*, L.A. TIMES, Jan. 21, 1997, 1997 WLNR 5642077.

¹⁸¹ See, e.g., John Jalsevac, *Hundreds of Pro-Life Student Groups Sweeping Across U.S. College Campuses*, LIFESITENEWS.COM (Dec. 9, 2010), <http://www.lifesitenews.com/news/students-for-life-of-america-raising-up-a-new-generation-of-pro->

to pay off: in May 2009, in the Annual Beliefs and Values Survey conducted by the Gallup Corporation, 51% of those surveyed identified themselves as “pro-life,” an increase of 7% since 2008.¹⁸² A January 2010 Marist/Knights of Columbus poll suggested that this increase could be attributable to generational change: 58% of eighteen to twenty-nine year olds and 60% of thirty to forty-four year olds agreed that abortion was morally wrong.¹⁸³

By contrast, as Nancy Keenan joked, the pro-choice leadership was “the menopausal militia”—reflecting the concern that the leadership was aging and the movement had not effectively connected with younger women.¹⁸⁴ Movement leaders worried that women born after 1973 understood neither the threat to legal abortion nor the struggles of women who lacked access to the procedure before *Roe*.¹⁸⁵ Indeed, by 2009, for the first time in fifteen years, polls taken by the Pew Research Center and the Gallup Corporation showed that a majority of respondents identified as pro-life.¹⁸⁶

Some abortion-rights supporters attributed this shift to their movement’s “fail[ure] to acknowledge that many find abortion deeply troubling, even if they support the core principle of choice.”¹⁸⁷ Generally, however, abortion-rights groups worked to recruit younger supporters by “focusing on issues less controversial . . . such as the rising price of birth control on college campuses.”¹⁸⁸ The decision to make choice more abstract and less directly connected to abortion came not only in response to *Roe* but also in response to the changing political circumstances of the 1990s and 2000s.

Of course, throughout the period studied here, feminists in the academy forged bold new ways of understanding reproductive decision-making, including theories centered on reproductive justice and equal citizenship.¹⁸⁹ Nonetheless, since 1973, the choice framework has enjoyed considerable in-

life-warrior, *archived at* <http://perma.cc/9FF8-EJM3>; Mary Meehan, *Feminists for Life on Campus*, HUM. LIFE REV., July 2008, at 64.

¹⁸² See Lydia Saad, *More Americans Pro-Life Rather than Pro-Choice for First Time*, GALLUP, May 15, 2009, <http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx>, *archived at* <http://perma.cc/FSW7-Z5WG>.

¹⁸³ See Lisa Socarras, *Generation Y: The Pro-Life Generation*, NAT’L. CATHOLIC REG., Nov. 2, 2010, www.ncregister.com/daily-news/generation-y-the-pro-life-generation, *archived at* <http://perma.cc/PGX9-B68A>.

¹⁸⁴ Stephanie Simon, *The New Abortion Warriors*, L.A. TIMES, Jan. 22, 2008, 2008 WLNR 1210660; *see also* Kliff, *supra* note 171.

¹⁸⁵ See Editorial, *A Call to a New Generation to Fight On*, STAR LEDGER, June 8, 2012, 2012 WLNR 12033184; Kliff, *supra* note 171; Simon, *supra* note 184; Laura Sessions Stepp, *For Abortion Rights, A Changing of the Guard*, WASH. POST, Apr. 24, 2004, at C1.

¹⁸⁶ See Saad, *supra* note 182; *see also* *Support for Abortion Slips*, PEW RESEARCH CTR. (Oct. 1, 2009), <http://www.pewforum.org/Abortion/Support-for-Abortion-Slips.aspx>, *archived at* <http://perma.cc/536F-8KDX>.

¹⁸⁷ Simon, *supra* note 184.

¹⁸⁸ *Id.*

¹⁸⁹ For discussion of the reproductive-justice movement, see ASIAN CMTYS. FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS AND REPRODUCTIVE JUSTICE, *archived at* <http://perma.cc/8H3Z-L38Q>.

fluence, although its prominence has varied over time. The Supreme Court's intervention—and the movement's interest in consolidating a fragile constitutional victory—only partly explain the influence of a single-issue, choice-based approach. At times, social-movement dialogue made the framework seem more (or less) advantageous. The shifting political landscape made choice-based claims appear more effective under some circumstances than others. As we have seen, the choice framework has deficiencies, but its prominence stems as much from ordinary politics as from the demands of constitutional law.

A few general observations become clear from the history considered here. First, the choice framework associated with *Roe* gained (or lost) prominence for reasons unrelated to the rhetoric or relevance of the Court's decision. Choice-based rhetoric became more influential partly because of the claims made by abortion opponents and the changing political opportunities available to each side. Second, the choice framework did not always resemble the idea of privacy set forth in *Roe*. The Court's decision justified the importance of reproductive choice by reference to the consequences of unplanned pregnancy or child-rearing for women.¹⁹⁰ In *Roe*, the abortion right was one of several privacy interests related to contraception, marriage, and procreation, although physicians had a unique stake in the abortion right.¹⁹¹ By contrast, the choice framework used by movement activists was much more changeable and abstract. "Choice" tended to belong to women, rather than physicians, and it tended to protect individual self-determination rather than narrower interests in sex and reproduction.

Finally, the choice framework changed considerably over time. The "right to choose" invoked only abortion at various points, while at other times it covered a broader variety of reproductive health services. On some occasions, choice rhetoric tied privacy and equality interests to one another, while on others it addressed only individual freedom from government interference. *Roe* only partly explains the emergence and persistence of the choice framework.

Insofar as the choice framework offers an example, ordinary politics have contributed to the prominence of what many believe to be a problematic justification for abortion rights. Part III will explore the normative implications of this fact. But what role did the Court's decision in *Roe* play in the emergence of a single-issue approach to reproductive law and politics? Feminist critics suggest that the opinion encouraged the pro-choice move-

¹⁹⁰ See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (discussing the "psychological harm," "distress," "stigma of unwed motherhood," and other difficulties women suffered as a result of unplanned pregnancies in rationalizing the privacy right protecting abortion as necessary to prevent psychological harm).

¹⁹¹ See *id.* at 152–53, 164 (explaining that "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician" and linking the abortion right to interests in procreation, contraception, marriage, and parental rights) (emphasis added).

ment to abandon other reproductive-justice issues in order to protect legal abortion. Part II revisits this issue by developing an account of efforts to create a far-reaching reproductive-rights agenda. A group of radical feminists and women's health activists fought for the kind of broad reform the Supreme Court supposedly undermined. This strategy lost influence when American politics shifted to the right, chipping away at support for welfare rights and increasing the threat to constitutional protections for abortion. The Court's decision in *Roe* played only one role in a much more complex story.

II. BEYOND ABORTION: EXPANDING THE AGENDA, 1973–1981

Much as the *Roe* decision did not inevitably lead supporters of abortion rights to emphasize unsatisfying choice arguments, the Supreme Court's intervention did not prompt the entirety of the abortion-rights movement to gravitate toward a single-issue agenda. This Section focuses on a group of movement dissenters who impacted debate about the relationship between feminism and healthcare for women. By spotlighting these advocates, this Section recaptures the voices of those who did not see *Roe* as a reason for pursuing a single-issue agenda. Moreover, telling the story of feminist women's health activists makes clear how ordinary politics forced even the most uncompromising activists to turn to a single-issue strategy.

The Section centers on the decade after *Roe*, since this period held out the most promise for feminists seeking to craft a broad reproductive-justice agenda. Feminists celebrated victory in *Roe v. Wade*, pushed for a federal ERA, and drew on ideas offered by an emerging group of feminists of color. Even in this promising period, however, a rapidly changing political terrain undermined attempts to advance a broad reproductive-justice agenda. The history of the decade after the *Roe* decision offers particularly powerful testimony about how ordinary politics obstructed the progress of a multi-issue platform.

This Section begins by tracing efforts in the late 1970s to move beyond a single-issue agenda. It examines the origins of this campaign in the late 1960s, exploring the influence of a potent movement to change healthcare delivery for women. Activists pursued legal protections against sterilization abuse and demanded state support for childcare, family planning, and healthcare. The Section next examines the reasons for the decline of a multi-issue agenda in the early 1980s, when abortion opponents and social conservatives made substantial gains in Congress and the White House. With new power in Congress, antiabortion legislators posed an imminent threat to legal abortion. Significantly, shifting abortion politics figured in a general shift to the political right. Once a subject of academic study, neoliberalism—a policy vision of individual liberty, deregulation, limited government, and the superiority of free markets—became a compelling political message spread by Ronald Reagan and his allies in Congress. Leaders of both the Republican and Dem-

ocratic Parties embraced the rhetoric of small government that Reagan championed. Far from seeing welfare rights as a crucial part of reproductive freedom, neoliberalism presented state support as a source of dysfunction and unnecessary expense. In this new political climate, feminists came to view a broader reproductive justice agenda as a lost cause.

A. Movement Dissenters Respond to Roe by Creating a Multi-Issue Agenda

The creation of a broader reproductive-rights strategy began partly in the feminist women's health community.¹⁹² In the late 1960s and early 1970s, feminists developed a forceful critique of the medical establishment, claiming that it failed to inform, respect, or help women. These concerns grew in response to controversies in the early 1970s involving contraception, dangerous drugs, and sterilization abuse. In the wake of these scandals, women's health activists worked to create a broad reform program in which abortion played only one part. Even in addressing abortion, they emphasized the importance of government support for women who could not afford reproductive healthcare. Members of that group echoed views expressed by women of color in the early 1970s. Writing in the late 1960s and early 1970s, Florynce Kennedy and Frances Beal suggested that women of color needed more than freedom from government meddling.¹⁹³ As Beal explained in 1969: "The lack of the availability of safe birth control methods, the forced sterilization practices, and the inability to obtain legal abortions are all symptoms of a decadent society that jeopardizes the health of black women (and thereby the entire black race). . . ."¹⁹⁴

In the wake of a series of scandals, feminists concluded that women needed not just legal abortion but a radically different model of healthcare. In 1969, one year after sales of the birth-control pill reached the \$150 million mark, magazine columnist Barbara Seaman exposed the mostly unreported dangers associated with the popular contraceptive method.¹⁹⁵ In 1971, other studies revealed that diethylstilbestrol (DES), a popular drug thought to reduce the risk of miscarriages, led to increased cancer rates later in life

¹⁹² On the history of the feminist women's health movement, see, for example, SANDRA MORGEN, *INTO OUR OWN HANDS: THE WOMEN'S HEALTH MOVEMENT IN THE UNITED STATES, 1969–1990* (2002); SHERYL BURT RUZEK, *THE WOMEN'S HEALTH MOVEMENT: FEMINIST ALTERNATIVES TO MEDICAL CONTROL* 144–46, 151 (1978).

¹⁹³ See SCHULDER & KENNEDY, *ABORTION RAP*, *supra* note 38; Beal, *Black Women's Manifesto*, *supra* note 38, at 52.

¹⁹⁴ Beal, *Black Women's Manifesto*, *supra* note 38, at 52.

¹⁹⁵ On sales of the pill, see, for example, RICKIE SOLINGER, *PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE HEALTH POLITICS IN AMERICA 171–72* (2005). For the text of Seaman's work, see BARBARA SEAMAN, *THE DOCTORS' CASE AGAINST THE PILL: 25TH ANNIVERSARY EDITION* (1995). On the importance of Seaman's work, see, for example, ELAINE TYLER MAY, *AMERICA AND THE PILL: A HISTORY OF PROMISE, PERIL, AND LIBERATION* 130–34 (2010); MORGEN, *supra* note 192, at 8–10.

for women exposed to the drug in utero.¹⁹⁶ These scandals magnified worries that medical professionals prevented women from making informed decisions about the care they received.¹⁹⁷

In response to those concerns, in the 1960s, women worked to develop a new model of healthcare delivery, opening feminist women's health centers in a number of metropolitan areas.¹⁹⁸ Carol Downer, a member of the NOW Abortion Committee, had popularized the idea of women-centered care in the early 1970s, embarking with her colleague Lorraine Rothman on a 1971 national tour in which she demonstrated cervical self-exams.¹⁹⁹ In 1973, the Boston Women's Health Collective put out a volume, *Our Bodies, Ourselves*, that served as a rallying cry for the emerging women's health movement.²⁰⁰ By 1975–1976, the feminist women's health movement turned to health advocacy to advance a distinctive vision of social change.²⁰¹ Founded in 1975, one group leading this effort, the National Women's Health Network (NWHN), brought together a number of influential individuals and organizations critical of the medical mainstream.²⁰²

In 1977, NWHN began a campaign to fund free abortions and joined NOW, NARAL, and several other women's health groups in coordinated protests against bans on the public funding of abortion.²⁰³ As NWHN became more deeply involved in abortion politics in 1977–1978, leaders of the organization became more critical of the mainstream abortion-rights movement. NWHN's position paper highlighted the belief that abortion was one of several interrelated issues of reproductive freedom.²⁰⁴ NWHN members believed that effective abortion advocacy had to touch on other issues of reproductive health or even social justice.²⁰⁵ According to NWHN members, women chose abortion partly because of the lack of child-care alternatives,

¹⁹⁶ On the DES scandal, see, for example, DAVIS, *supra* note 39, at 238; MORGEN, *supra* note 192, at 10.

¹⁹⁷ See, e.g., DIANA BARBARA DUTTON, *WORSE THAN THE DISEASE: PITFALLS OF MEDICAL PROGRESS* 230–35 (1988).

¹⁹⁸ On the spread of such clinics, see, for example, MORGEN, *supra* note 192, at 100.

¹⁹⁹ See *id.* at 22–24; BROWNMILLER, *supra* note 40, at 125–128; WENDY KLINE, *BODIES OF KNOWLEDGE: SEXUALITY, REPRODUCTION, AND WOMEN'S HEALTH IN THE SECOND WAVE* 74 (2010).

²⁰⁰ See DAVIS, *supra* note 39, at 100–01; MORGEN, *supra* note 192, at 241. For analysis of the impact of the volume, see, for example, DAVIS, *supra* note 39, at 18.

²⁰¹ See MORGEN, *supra* note 192, at 27–29.

²⁰² See *id.* at 29–31; SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 168–69 (1991); Meeting Minutes, NWHN (Aug. 7–8, 1976) (available in the Barbara Seaman Papers, MS 141, Schlesinger Library, Harvard University).

²⁰³ On NWHN's mobilization around issues tied to the Hyde Amendment, see, for example, Press Release, NWHN, Launching of the Women's Health Network "One on One Campaign" (1977) (available in the Barbara Seaman Papers, MS 142, Schlesinger Library, Harvard University); Letter from NWHN to President Jimmy Carter et al. (Aug. 11, 1977) (available in the Barbara Seaman Papers, MS 142, Schlesinger Library, Harvard University).

²⁰⁴ See *id.*

²⁰⁵ See *id.*

welfare rights, and health-care options available to them, and any true supporter of abortion rights had an obligation to campaign for a full array of reproductive health choices as much as for legal abortion itself.²⁰⁶

Another organization, the Committee for Abortion Rights and Against Sterilization Abuse (CARASA), saw the creation of a broad reproductive rights agenda as necessary for any meaningful reproductive choice.²⁰⁷ In 1978, CARASA and other reproductive-justice groups formed a national organization, the Reproductive Rights National Network (R2N2), to promote a radical, law-reform agenda for reproductive rights.²⁰⁸ R2N2 brought together over fifty progressive and feminist groups committed to the vision articulated by founding member Meredith Katz, who urged supporters of abortion rights to go beyond a single issue agenda.²⁰⁹ R2N2 later described the reasons for its founding as follows: “We have purposely chosen not to become a single issue organization because we feel the issues of access to childcare, jobs, and health care are inseparable parts of a woman’s right to reproductive choice.”²¹⁰

Founding members heavily criticized the mainstream movement’s single-issue focus.²¹¹ R2N2 members believed that a single issue agenda reflected the illegitimate aims of a population control movement interested in controlling poor and non-white women.²¹² In response, member organizations of R2N2 worked to prove that the organization remained “as committed to defending the reproductive rights of working-class and minority women as we are to abortion rights, and that [members saw] the relationship between the two.”²¹³

To R2N2 members, a single issue agenda also seemed doomed to fail. Abortion enjoyed little public support, and, standing alone, a right to abortion meant little to women exposed to sterilization abuse or struggling to pay for birth control or child care.²¹⁴ As one member group explained: “We distinguish ourselves from NOW, NARAL, PP, and others on the abortion issue in that we see abortion as a key part of women’s control over reproduction,

²⁰⁶ *See id.*

²⁰⁷ On CARASA’s history, see, for example, REBECCA M. KLUCHIN, *FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950–1980* 196–98 (2009); JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT*, 150–55 (2003).

²⁰⁸ *See, e.g.*, KLINE, *supra* note 199, at 92.

²⁰⁹ *Id.* at 92–93.

²¹⁰ Brochure, Reproductive Rights National Network, Women United to Defend Abortion Rights and End Sterilization Abuse (n.d., ca. 1980) (available in the Reproductive Rights National Network Papers, Bingham Library, Duke University).

²¹¹ *See, e.g.*, KLINE, *supra* note 199, at 91–93; NELSON, *supra* note 207, at 137–49.

²¹² NELSON, *supra* note 207, at 149–50.

²¹³ *Id.* at 150.

²¹⁴ *See, e.g., id.* at 147–50.

not as a single issue or as part of a policy of population control by the government or medical establishment.”²¹⁵

B. A New Political Environment Makes a Single-Issue Approach More Compelling

In the early 1980s, however, new political challenges undercut the momentum R2N2 had built for a broader reproductive rights platform. In 1981, antiabortion proposals circulating in Congress raised concerns within R2N2 about the abortion issue. In 1980, Ronald Reagan won a landslide election, and Republicans took control of the Senate.²¹⁶ Abortion opponents claimed that a majority of members of the House and “44 out of 100 senators” opposed abortion.²¹⁷ Between fall of 1980 and early 1981, several major pieces of antiabortion legislation came before Congress. Senator Jesse Helms (R-NC) proposed a statute concluding, contrary to *Roe*, that life began at conception.²¹⁸ Several months later, Senator Orrin Hatch (R-UT) proposed a constitutional amendment that would undo *Roe* and allow the states and Congress to restrict or ban abortion (where state and federal laws conflicted, the more onerous one would trump).²¹⁹

In response to the new antiabortion threat in Congress, R2N2 drafted a task force paper that reflected concerns about the willingness of mainstream groups to sacrifice the rights of poor women.²²⁰ This criticism touched on the substantive priorities and rhetoric of mainstream groups. As the position paper explained: “The R2N2 recognizes that the ‘individual choice’ perspective does not provide a sufficient basis for organizing [T]he social context within which ‘individual choices’ are made is crucial.”²²¹ Expanding the movement’s agenda proved to be more difficult, however. R2N2 mem-

²¹⁵ CARASA, CARASA PROPOSAL ON ABORTION RIGHTS STRATEGY FOR R2N2 (1981) (available in the Reproductive Rights National Network Paper, Bingham Library, Duke University).

²¹⁶ On the 1980 election, see, for example, STEPHEN E. FRANTZICH & CLAUDE BERUBE, CONGRESS: GAMES AND STRATEGIES 49 (2000).

²¹⁷ See, e.g., *Right to Life Committee Plans Drive for Anti-Abortion Amendment*, N.Y. TIMES, June 30, 1980, at A17.

²¹⁸ On the human life bill, see, for example, Beck, *supra* note 80; *Abortion Foes Offer Bill: Life Begins with Conception*, CHI. TRIB., Feb. 11, 1981, at 8; Jon Margolis, *The Abortion Struggle on Capitol Hill*, CHI. TRIB., Mar. 22, 1981, at A2; Weinraub, *supra* note 80. On the view that the human life bill was not constitutional, see, for example, *The Human Life Bill: Hearing on S. 158 Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 97th Cong. 242–56 (1981) (statement of Laurence H. Tribe, Professor, Harvard Law School); *id.* at 515–75 (1981) (statement of Norman Dorsen, Professor, New York University School of Law).

²¹⁹ On the Hatch Amendment, see, for example, Bennetts, *Antiabortion Forces*, *supra* note 81, at B2.

²²⁰ See R2N2, Abortion Task Force Paper, 3–4, 7–8, 10–14, 16–17 (1981) (available in the Reproductive Rights National Network Papers, Bingham Library, Duke University).

²²¹ *Id.* at 10. For the views of R2N2 members on the shortcomings of the mainstream abortion-rights movement, see, for example, CARASA, *supra* note 215.

bers hotly debated how best to respond to the new antiabortion threat. For example, Karen Stamm, a veteran member, worried that working with mainstream groups on abortion issues would dilute the commitment and energy of R2N2 itself.²²²

By contrast, New York members leading CARASA believed that reproductive justice activists would have to prioritize the abortion issue in the near term or risk losing abortion rights altogether. CARASA members also insisted in presenting abortion as part of a more robust agenda for women's control over reproduction, "not as a single issue."²²³ Nonetheless, CARASA members believed that reproductive rights advocates could not afford any distractions from the abortion issue. As CARASA argued of the human life bill proposed by Helms "the actual physical threat . . . to all women cannot be stressed enough."²²⁴

In spite of the opposition of some member organizations, R2N2 ultimately prioritized the abortion issue at the expense of a broader agenda. In draft, the organization's position paper on abortion explained that R2N2 had "selected abortion rights as [its] focus for this period because of the immediacy of the attack from the New Right."²²⁵ The final draft simply stated: "[t]he defense of abortion rights is the most urgent task facing the women's movement."²²⁶ The single-issue approach taken by R2N2 and the mainstream movement reflected two interrelated trends. With the emergence of the human life bill and the Hatch Amendment, legal abortion appeared to be in imminent peril.²²⁷ The antiabortion movement appeared ready to undo reproductive rights women already enjoyed. Asking for broader rights likely seemed unrealistic.

The success of antiabortion politicians foreshadowed a larger change to the American political landscape, as Ronald Reagan and his allies re-characterized welfare rights as a source of dependency and out-of-control costs.²²⁸ When the idea of rights to state support lost popularity, the reproductive rights agenda promoted by R2N2 seemed out of reach. During his political rise, Reagan successfully championed a new policy vision, neoliberalism, which had emerged in the academy in the 1930s and 1940s.²²⁹ Drawing on

²²² See Karen Stamm, Summary of Recent Activity on Sterilization Abuse Seen in Light of Future Organizing Possibilities (Mar. 1981) (available in the Reproductive Rights National Network Papers, Bingham Library, Duke University) (expressing concern about the ideological and tactical costs of a partnership with mainstream abortion-rights groups).

²²³ CARASA, *supra* note 215, at 1.

²²⁴ *Id.*

²²⁵ R2N2, Abortion Task Force Paper (Draft 1981) (available in the Reproductive Rights National Network Papers, Bingham Library, Duke University).

²²⁶ R2N2, Abortion Task Force Paper, *supra* note 220.

²²⁷ See, e.g., *id.*

²²⁸ On Reagan's small government rhetoric, see, for example, GIL TROY, MORNING IN AMERICA: HOW RONALD REAGAN INVENTED THE 1980s 26, 40, 342 (2005).

²²⁹ On the re-framing of welfare and bipartisan consensus that the welfare system required reform, see, for example, DANIEL BÉLAND & ALEX WADDAN, THE POLITICS OF

the work of theorists from Friedrich Hayek to Milton Friedman, neoliberals in the academy lent new credibility to arguments for the virtues of small government.²³⁰ During the 1980 election, Ronald Reagan translated neoliberalism into a popular attack on big government.²³¹ Drawing on suggestions from think tanks such as Paul Weyrich's Heritage Foundation, Reagan praised market-based policy solutions, low taxes, and a leaner and more efficient federal government.²³² In particular, Reagan attacked the welfare state for being too large and too likely to undercut Americans' independence and self-respect.²³³ To some extent, Reagan's rhetoric reflected growing hostility to welfare rights expressed by both political parties. Like his successor, Ronald Reagan, Democrat Jimmy Carter promised to increase "self-sufficiency through work rather than welfare."²³⁴ With grassroots conservatism on the rise, Democrats and Republicans appeared to have rejected the idea of a broad right to state support on which R2N2 relied.²³⁵

In this new political environment, defending a broad reproductive rights platform seemed at best unrealistic and at worst counterproductive. The idea of welfare rights no longer appeared to resonate with the American public. Moreover, if R2N2 did not prioritize the defense of legal abortion, feminists feared they would lose the few reproductive rights they already enjoyed.²³⁶

The story of the broader reproductive-justice framework that emerged in the 1970s raises important questions about leading studies on *Roe*'s impact. The Supreme Court's decision supposedly led feminists to narrow their demands and to neglect other reproductive-rights issues. As we have seen, however, some abortion-rights groups developed a more comprehensive reproductive-justice framework in the immediate aftermath of *Roe*. The decision played only a limited part in shaping abortion politics.

Reproductive-justice activists, like contemporary scholars, viewed a single-issue strategy as problematic and offered a far-reaching alternative.

POLICY CHANGE: WELFARE, MEDICARE, AND SOCIAL SECURITY REFORM IN THE UNITED STATES 44 (2012); ANDREW E. BUSCH, RONALD REAGAN AND THE POLITICS OF FREEDOM 103 (2001); MARISSA CHAPPELL, THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA 199–200 (2011).

²³⁰ See, e.g., DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 4–7 (2012).

²³¹ See, e.g., *id.* at 6.

²³² See, e.g., MONICA PRASAD, THE POLITICS OF FREE MARKETS: THE RISE OF NEOLIBERAL ECONOMIC POLICIES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES 49–53 (2006); JONES, *supra* note 230, at 263–66.

²³³ See, e.g., BÉLAND & WADDAN, *supra* note 229, at 43–44; CHAPPELL, *supra* note 229, at 199.

²³⁴ Jimmy Carter, The State of the Union Annual Message to Congress (Jan 16, 1981), archived at <http://perma.cc/N6V5-TRAY>. On Carter's interest in deregulation, see, for example, JONES, *supra* note 230, at 248.

²³⁵ See, e.g., *id.* at 180–216; see also PRASAD, *supra* note 232, at 45–62.

²³⁶ By 1984, R2N2 dissolved, as Suzanne Staggenborg explains, largely "because of a lack of money and national leadership." STAGGENBORG, *supra* note 202 at 169. R2N2 and CARASA also struggled because of internal divisions concerning the priority the organization should assign to questions of race. See, e.g., NELSON, *supra* note 207, at 139–40.

Roe did little to dissuade these activists. Among feminist women's health advocates, it was changes to abortion politics that made a narrow reform platform more compelling.

III. ORDINARY POLITICS, CONSTITUTIONAL LAW, AND SOCIAL CHANGE

What would happen if abortion rights were no longer constitutional? For pro-choice activists, there would be obvious costs. Some states, including those with trigger laws (statutes that would automatically ban abortion upon the overruling of *Roe*), would ban or more heavily regulate abortion.²³⁷ Nonetheless, scholars have pointed to a number of benefits that might follow the de-constitutionalization of abortion rights. Movement members cannot directly control whether the Supreme Court (or any other state actor) continues to afford protection to abortion rights. Just the same, if the costs of defending those constitutional protections far exceed any benefit, movement members would have reason to redirect scarce funds and political influence toward more valuable goals.²³⁸

Drawing on the history presented in Parts I and II, this Section reexamines several of the benefits that scholars argue would follow from the de-constitutionalization of the abortion issue. Leading studies have spotlighted the shortcomings of a single-issue strategy based on choice. However, as this Section shows, movement members turned time and time again to choice arguments when they believed that the courts would no longer protect abortion rights. Similarly, the realities of national elections and political deal-making pushed the movement toward a single-issue agenda. The Supreme Court's intervention does not explain the continuing emphasis put on what many find to be an inadequate approach to reproductive rights. The Section concludes by illuminating some of the first steps movement members might take to change the political circumstances that make a single-issue, choice-based framework so appealing: specifically, confronting head-on the difficult moral questions surrounding abortion and making more visible the women who choose abortion. In the past, movement leaders have experimented effectively (if temporarily) with similar strategies. By building on such tac-

²³⁷ On the status of trigger laws, see generally Matt Berns, *Trigger Laws*, 97 *Geo. L.J.* 1639, 1639–88 (2009); 'Roe v. Wade': *The Divided States of America*, USA TODAY, (Apr. 17, 2006), http://www.usatoday.com/news/washington/2006-04-16-abortion-states_x.htm, archived at <http://perma.cc/SU7Z-EYJ>.

²³⁸ See, e.g., Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For and To Social Movements: An Introduction*, in *CAUSE LAWYERING AND SOCIAL MOVEMENTS* 11–12 (Austin Sarat & Stuart Scheingold eds. 2006) (summarizing some of the costs and benefits movements face when litigating); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 *VA. L. REV.* >For 1435, 1504 (2013) (explaining that those "sharing an interest in vindicating a certain vision of the Constitution will often not be able to muster the resources to support costly, time-consuming, and uncertain federal court litigation"). For further discussion of gay rights litigation, see GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 341 (2d ed. 2008).

tics, the movement might finally remove some of the stigma surrounding the abortion procedure and the women who seek it out.

A. *Reconsidering the Costs of Constitutionalizing the Abortion Issue*

The abortion-rights movement cannot dictate whether the Supreme Court preserves, modifies, or rejects existing protections for abortion rights. Just the same, the value that activists attach to those constitutional protections can shape crucial strategic decisions. If preserving a constitutional abortion right matters a great deal, movement leaders may commit substantial financial resources to litigation and to the federal judicial nomination process.²³⁹ By contrast, if constitutional protections have actually damaged the movement's cause, activists would be better served by focusing on more productive objectives.²⁴⁰ If constitutionalizing abortion hurt the cause of reproductive rights, then activists should not concern themselves too much about the overruling of *Roe*.

By understanding the history of the movement's turn to a single-issue, choice-centered approach, we can gain new insight into how de-constitutionalizing abortion would impact abortion-rights advocacy. According to some scholars, constitutionalizing the issue has put artificial and destructive constraints on the way activists describe abortion access.²⁴¹ *Roe* became perennially vulnerable.²⁴² In defending it, activists were in one way or another addressing the Court or anticipating the Justices' responses.²⁴³ The rhetoric of constitutional law, in turn, is limited: an abstract language of obligations and entitlements that poorly reflects the complexity of many citizens' views of abortion.²⁴⁴ De-constitutionalizing abortion would allow activists to address the people rather than the Court.²⁴⁵

²³⁹ Cf. TOMIKO BROWN-NAGIN, *COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT* 135 (2011) (explaining how civil rights activists "modulated their attitudes toward civil rights lawyers and court-centered activism as circumstances dictated").

²⁴⁰ Cf. ROSENBERG, *supra* note 238, at 341.

²⁴¹ See, e.g., West, *supra* note 7, at 1406 (explaining that choice-based claims "do not do justice to the aspirational goals of the women's movement's early arguments for reproductive rights"); Mallika Kaur Sarkaria, Comment, *Lessons from Punjab's "Missing Girls": Toward a Global Feminist Perspective on "Choice" in Abortion*, 97 CALIF. L. REV. 905, 937 (2009) (arguing that the "U.S. feminist approach to abortion has focused on 'choice' and the 'right to choose' ever since the U.S. Supreme Court recognized women's right to abortion in *Roe v. Wade*" and explaining how such binary arguments fail to capture the needs and experiences of women in the Punjabi context).

²⁴² See, e.g., West, *supra* note 7, at 1400.

²⁴³ See *id.* at 1401. For perspective on how constitutional law can shape political dialogue, see generally GORDON SILVERSTEIN, *LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* (2009).

²⁴⁴ On the shortcomings of rights rhetoric in the abortion context, see, for example, West, *supra* note 7, at 1428; Law, *supra* note 1, at 1020.

²⁴⁵ See, e.g., West, *supra* note 7, at 1404.

As we have seen, however, in the past several decades, activists used these apparently problematic choice claims at least partly because they appealed to voters. At various points, movement members believed that the courts were a lost cause. Using choice-based claims made sense to activists trying to build public support or raise money. The need to appeal to those who did not fully support abortion made choice-based claims more appealing.

A second supposed benefit of de-constitutionalization involves the priorities of abortion-rights activists—when supporters of reproductive rights no longer have to defend the *Roe* decision, they will be better able to find common ground with the opposition on other issues related to contraception, health care, and the treatment of pregnant women and new mothers.²⁴⁶ By working to save constitutional abortion rights at all costs, the movement is said to have deemphasized other aspects of reproductive healthcare. “By putting legal abortion in its place—that is, putting it in the context of a reproductive justice agenda pursued in the legislative arena,” Robin West asserts, “pro-choice advocates might find common cause with pro-life movements that responsibly seek greater justice for pregnant women who choose to carry their pregnancies to term, working families, and struggling mothers.”²⁴⁷

The history studied here provides some support for these concerns. Groups like R2N2 and CARASA did abandon a broader agenda when constitutional abortion rights seemed to be in imminent peril. But would activists prioritize abortion any less if the Court no longer protected it? When the Justices retreated from *Roe* in *Webster*, the opinion provoked a backlash with the abortion issue at its center.²⁴⁸ The greater the threat to legal abortion, the more focused reproductive-rights activists seem have to become about ensuring access to the procedure. If *Roe* were overruled, we might expect activists to put even greater emphasis on the abortion issue, campaigning to protect what they once took for granted. Activists might also scale back on their demands for other forms of reproductive justice, as they have in the past, if they feel that even established rights are under attack. If the history studied here offers any example, the pro-choice movement might pursue an even less comprehensive agenda if abortion rights lost protection. Finally, some scholars suggest that de-constitutionalizing abortion might allow for a

²⁴⁶ See, e.g., *id.* at 1426–28; Williams, *supra* note 10, at 1561 (arguing that rights and choice rhetoric cast women who pursue their own interests above interests of child as selfish).

²⁴⁷ West, *supra* note 7, at 1427.

²⁴⁸ On post-*Webster* backlash, see, for example, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 328–29 (2009); BARBARA M. YARNOLD, ABORTION POLITICS IN THE FEDERAL COURTS: RIGHT VERSUS RIGHT 21 (1995); Loretta Ross, *African-American Women and Abortion, in* ABORTION WARS: A HALF-CENTURY OF STRUGGLE, 1950–2000, 195 (Rickie Solinger ed., 1998).

more productive dialogue about abortion.²⁴⁹ They argue that the choice framework is flawed. It privileges individual freedom and does little to justify or protect women who need assistance from the government.²⁵⁰ It undercuts arguments for caretakers' rights and deemphasizes any connection between sex equality and fertility control.²⁵¹ The choice framework presents abortion as something to which women are entitled, encouraging some to view women as selfish or irresponsible.²⁵² In addition, the choice framework discourages discussion of the moral ambiguities of abortion.²⁵³

As we have seen, however, the choice framework has enjoyed continuing prominence partly because of the demands of ordinary politics. Reproductive-rights groups have turned to choice-based arguments not only to influence the courts but also to impact elections and build popular support. So long as the movement prioritizes lobbying and influencing elections, choice-based claims will likely remain important. The movement privileges the idea of choice as a means of exercising the most influence in the short term, for choice appeals to a broader segment of the population. Choice-based arguments allow the movement to avoid difficult questions about the morality of and rationale for abortion.

Seen in historical context, the de-constitutionalization of abortion will not likely be worth its considerable costs. If the Supreme Court overrules *Roe*, many states that currently restrict abortion would ban it entirely.²⁵⁴ Access to abortion—already a problem for many—would become even more rare in many American communities.²⁵⁵ The considerable stigma surrounding abortion may well increase when state law can once again brand as criminals any women who seek out the procedure.²⁵⁶ Significantly, however, de-constitutionalization would likely impose these costs without providing any of the benefits scholars expect. If the Court de-constitutionalizes abortion, many of the shortcomings we now see—particularly, the rise of unsatisfying choice arguments and a single-issue agenda—seem likely to persist. In meeting the demands of ordinary politics, abortion-rights activists have pursued the very strategies that so many commentators find troubling.

²⁴⁹ See, e.g., West, *supra* note 7, at 1428–29.

²⁵⁰ See *id.* at 1403; Law, *supra* note 1, at 1020; Rausch, *supra* note 9, at 62 (“For poor women, the right to choose is somewhat bare” without public funding.).

²⁵¹ See West, *supra* note 7, at 1403.

²⁵² See Williams, *supra* note 10, at 1561 (“[f]eminists have used the rhetoric of choice with little understanding of the ways it awakens gender fears about selfish mothers”).

²⁵³ See, e.g., West, *supra* note 7, at 1421, 1428–30.

²⁵⁴ On abortion law in a post-*Roe* world, see, for example, GUTTMACHER INSTITUTE, ABORTION POLICY IN THE ABSENCE OF *Roe*, State Policies in Brief as of March 1, 2014 (2014), archived at <http://perma.cc/ZPQ7-8ESM>.

²⁵⁵ On declining access to abortion, see Erik Eckholm, *Access to Abortion Falling as States Pass Restrictions*, N.Y. TIMES, Jan. 4, 2014, at A1.

²⁵⁶ On the stigma that once surrounded criminal abortions, see LESLIE J. REAGAN, DANGEROUS PREGNANCIES: MOTHERS, DISABILITIES, AND ABORTION IN MODERN AMERICA 154 (2010) (doctor who had openly performed illegal abortions explained that when he went to trial, his colleagues failed to show up for his defense).

B. *Toward a Richer Approach*

In order to create a more nuanced conversation about abortion, the movement will have to focus more on de-stigmatizing those subjects, like the abortion procedure or publicly funded abortion, about which the public is the most ambivalent. The mainstream abortion-rights movement has often focused on legal change.²⁵⁷ In general, organizations like NARAL have prioritized legal access to abortion. The main goal was not to convince the public of the need for equality or fertility control for women or even to de-stigmatize the procedure. This focus has involved a distinct set of tradeoffs: in ensuring legal access to abortion, activists have had to win over a citizenry that is ambivalent about abortion, the welfare state, and even feminism. One can question whether a different set of arguments—such as one connected to sex equality—would have been more politically resonant. Just the same, in the decades after *Roe*, movement members appeared convinced that choice arguments were less controversial, avoiding the stigma attached to abortion or the popular disagreements about the size of the welfare state.

It will not be easy to change public attitudes toward abortion, but a few first steps become apparent. First, abortion-rights activists pursuing such a goal will likely have to do more to make abortion, and women who benefit from the procedure, visible and sympathetic to the public.²⁵⁸ Although roughly four in ten unintended pregnancies result in abortion,²⁵⁹ abortion comes across as an intensely private subject, inappropriate for public discussion.²⁶⁰ By contrast, beginning in the mid-1960s, abortion opponents developed slide shows, signs, cartoons, and speeches depicting the fetus as an infant with a race, sex, and personality.²⁶¹ By making the fetus more visible, abortion opponents have successfully made the unborn more sympathetic

²⁵⁷ See, e.g., Anne Valk, *Fighting for Abortion as a "Health Right" in Washington, D.C.*, in *FEMINIST COALITIONS: HISTORICAL PERSPECTIVES ON SECOND-WAVE FEMINISM IN THE UNITED STATES* 135, 156 (Stephanie Gilmore ed., 2008) ("Implying that legal changes would enable all women to exercise their voluntary right of choice, the pro-choice movement obscured the systemic social and economic inequalities that obstructed women's ability to control their fertility."). For further discussion of the legal focus of the abortion-rights movement, see *BEFORE Roe v. Wade*, *supra* note 12, at xiii–xiv.

²⁵⁸ For examples of efforts of this kind, see *I Had An Abortion: Stories of Experiences*, EXPERIENCES PROJECT, <http://www.experienceproject.com/explore/I-Had-An-Abortion:-Stories-of-Experiences> (last visited Jul. 1, 2012), *archived at* <http://perma.cc/4ZXT-JHYJ>; *MY ABORTION, MY LIFE*, <http://www.myabortionmylife.org/pages/sharing-our-stories.php> (last visited Jul. 2, 2012), *archived at* <http://perma.cc/AS55-JKB4>.

²⁵⁹ *Facts on Induced Abortion in the United States*, GUTTMACHER INSTITUTE (Feb. 2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html, *archived at* <http://perma.cc/6WDA-76T7>.

²⁶⁰ On the framing of abortion as intensely personal, see Linda Gordon, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* (2002).

²⁶¹ See, e.g., SARA DUBOW, *OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA* 1–9 (2011).

and more human.²⁶² Similarly, beginning in the 1960s, the gay rights movement has dramatically increased the visibility of members of the gay, lesbian, bisexual, and transgender community.²⁶³ For this reason, poll data consistently show a correlation between the generation to which a person belongs and the amount of sympathy he has for LGBTQ individuals.²⁶⁴

Proponents of abortion rights have at times worked to make women who have chosen abortion more visible: before 1973, in addressing women who died during botched abortions, and in the mid-1980s, during the “Silent No More” Campaign. Generally, these campaigns have been a means to the end of obtaining or preserving legal access to abortion. If public attitudes toward the procedure are to change dramatically, however, de-stigmatizing abortion may well have to become an end in itself.

Second, in order to change popular opinion on abortion, activists likely will have to confront the morally complex questions surrounding abortion. One of the political benefits of the choice framework is its ability to move discussion away from the more uncomfortable questions tied to the issue: whether abortion involves justified (or unjustified) killing, when and why women view the fetus as a person, even when choosing abortion, or whether “opposite-sex partners who do not intend to conceive have a compelling moral duty to use birth control.”²⁶⁵ Dodging these questions does not make them go away, and abortion providers, women, and members of the public confront them when dealing with abortion. Changing public attitudes toward abortion will likely require activists to reshape public attitudes toward complex aspects of the abortion question.

What role does constitutional law play in these kinds of social change? A reliance on constitutional law may have set the movement back. While *Roe* raised the salience of abortion, the aftereffects of the decision drew at-

²⁶² See, e.g., SOLINGER, *supra* note 195, at 233 (“[O]nce the fetus/baby became visible, valuable, and potentially perfect (or perfectable), the concept of ‘fetal personhood’ flourished.”).

²⁶³ On the increasing visibility of gays and lesbians, see, for example, ERIC MARCUS, MAKING GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS 346 (2002); James W. Button et al., *The Politics of Gay Rights at the Local and State Level*, in THE POLITICS OF GAY RIGHTS 274 (Craig A. Rimmerman ed., 2000) (discussing the embrace of gay rights by a diverse range of municipal governments in the 1990s).

²⁶⁴ On the generational shift, see *Most Americans Support Same-Sex Unions*, MCBS NEWS (May 14, 2012), <http://www.cbsnews.com/news/poll-most-americans-support-same-sex-unions/>, archived at <http://perma.cc/GE3J-56NH>; *Persuasion and the Gay-Marriage Generation Gap*, THE ATLANTIC (May 18, 2012), <http://www.theatlantic.com/politics/archive/2012/05/persuasion-and-the-gay-marriage-generation-gap/257365/>, archived at <http://perma.cc/3AFG-L3CH>.

²⁶⁵ West, *supra* note 7, at 1429. For an argument dealing with self-defense and the idea of fetal killing, see EILEEN L. McDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 7 (1996). For an example of an effort to reconcile moral ambivalence about the status of the fetus with support for legal abortion, see, for example, Jeannie Ludlow, *Sometimes It’s a Child and a Choice: Toward an Embodied Abortion Praxis*, 20 FEMINIST FORMATIONS 26, 26–50 (2008).

tention away from other reproductive-justice issues at times.²⁶⁶ Some abortion-rights advocates, while defending the opinion against criticism from abortion opponents, justified choice-based claims they might otherwise have found unconvincing. Similarly, in the courts, abortion-rights supporters have relied on *Roe* as binding or persuasive precedent, at times relying on its privacy rationale rather than developing more compelling constitutional claims for abortion rights.²⁶⁷

The political opportunities linked to the choice framework, however, result as much from the particular dynamic of abortion politics as from *Roe* itself. Ordinary abortion politics have turned on the availability and legality of abortion. The choice framework enjoys continued support not only because the courts have constitutionalized abortion but also because the choice framework appears to convey political benefits. Creating a more productive or nuanced abortion debate will require more than the de-constitutionalization of the abortion issue.

CONCLUSION

We often think that *Roe* had a problematic impact on the movement for reproductive rights. The opinion gave pro-choice activists a tremendous but tenuous victory. Because abortion rights became vulnerable, *Roe* encouraged advocates to sacrifice other goals in order to preserve existing gains. At the same time, *Roe*'s rhetoric shaped pro-choice advocacy in the following decades. In defending the opinion's framing of the abortion issue, the movement made constitutional, choice-based arguments in explaining the importance of legal abortion.

Viewed in these terms, the constitutionalization of the abortion issue substantially damaged reproductive-rights advocacy. The *Roe* opinion supposedly undercut efforts to develop a more comprehensive reproductive-justice program. Once abortion became an issue of constitutional law, the movement emphasized choice-based contentions at the expense of more nuanced and convincing arguments.

While scholars compellingly demonstrate the shortcomings of the choice framework, no one has done a comprehensive history of the reasons

²⁶⁶ For discussion of the way in which court decisions can raise the salience of particular issues, see MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 464 (2004) (describing how decisions can generate backlash); Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 12 (Nathaniel Persily et al. eds., 2008).

²⁶⁷ For arguments of this kind made in Supreme Court amicus curiae briefs, see Brief for the National Organization for Women et al. as Amici Curiae, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379), 1985 WL 669622, at *1-4; Brief for Appellees, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1127727, at *1-11; Brief for Petitioners and Cross-Respondents, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 12006398, at *23-27.

for its continuing influence. In spite of common and biting criticism, why have leaders of the abortion-rights movement often pursued a single-issue, choice-driven agenda? This Article closes this gap in existing scholarship, making clear that ordinary politics have reinforced the choice framework. Choice-based claims have continued to play a substantial part in abortion-rights advocacy because those claims are believed to enjoy popular support. The goals of ordinary abortion politics—maximizing public approval and legal access to abortion—make choice claims more, rather than less, prominent.

Ordinary politics also reinforced interest in a single-issue approach. Beginning in the late 1970s, constitutional protections for abortion seemed to be in almost constant crisis. As American politics moved to the political right, the movement no longer believed it possible to advance a robust reproductive-justice agenda.

Removing the Constitution from discussion of abortion can only do so much. The participants in the abortion debate deserve a discussion that is more complex and fulfilling. However, constitutional law can neither give us such a discussion nor take it away. Abortion-rights supporters will have to do that work themselves.

