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## **An Incomplete Revolution: Reexamining the Law, History, and Politics of Marital Property**

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AN INCOMPLETE REVOLUTION:  
FEMINISTS AND THE LEGACY OF  
MARITAL-PROPERTY REFORM

Mary Ziegler\*

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INTRODUCTION

Did the divorce revolution betray the interests of American women? While there has been considerable disagreement about the impact of divorce reform on women's standard of living,<sup>1</sup> many agree that judicial practices involving the division of marital property and the allocation of alimony

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1. Lenore Weitzman at one point argued that new rules on the distribution of marital property and on alimony systematically undercompensated women and, more controversially, that women suffer a 73% decrease in standard of living following divorce. See LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 274–275 (1987). A number of critics have questioned Weitzman's statistical methodology and conclusions. See, e.g., Kate Stirling, *Women Who Remain Divorced: The Long Term Economic Consequences*, 70 SOC. SCI. Q. 549, 549–61 (1989); Stephen Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130–165 (Stephen Sugarman & Herma Hill Kay eds., 1990). Recently, Weitzman has acknowledged that the true decline in women's average, post-divorce standard of living is closer to 27%. See Katherine Webster, *Post-Divorce Wealth Gap Was Wrong, Agrees Author*, N.Y. TIMES, May 19, 1996, at A3.

have systematically disadvantaged women.<sup>2</sup> Most often, in the courts and the academy, commentators see these practices as evidence of the need for family law reform.<sup>3</sup>

These conclusions rely on a shared account of the history of divorce reform. According to this account, the transformation of divorce law in the 1970s and 1980s was a “silent revolution,” a reform led by legal experts that produced virtually no public debate or political controversy.<sup>4</sup> Women’s groups and women’s interests did not play a significant role in this debate and did not meaningfully influence no-fault reforms, because feminists were too preoccupied with the campaign for the Equal Rights Amendment (ERA).<sup>5</sup>

However, as this Article shows, the conventional historical narrative of the divorce revolution is not so much incorrect as incomplete. Histories of the divorce revolution have focused disproportionately on the introduction of no-fault rules and have correctly concluded that women’s groups did not play a central role in the introduction of such laws.<sup>6</sup> However, work on divorce law has not adequately addressed the history of marital-property reform or engaged with scholarship on the struggle for the Equal Rights Amendment to the federal Constitution.<sup>7</sup> Putting these two bodies of work

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2. Several studies published by state legislative commissions and scholars confirm this finding. See, e.g., *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803, 804–805 (1990); Marsha Garrison, *Equitable Distribution in New York: Results and Reform*, 57 BROOK. L. REV. 621, 720 (1991).

3. For a small sample of the rich and growing literature on directions for reform, see for example, Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2273–75 (1994); Milton Regan, *Spouses and Stereotypes: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303 (1994); Martha Minow and Deborah Rhode, *Reforming the Questions, Questioning the Reforms*, in *DIVORCE REFORM AT THE CROSSROADS* 191, 195 (Stephen Sugarman & Herma Hill Kay eds., 1990).

4. See HERBERT JACOB, *THE SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1983). For a sample of the work relying on Jacob’s account see, for example, Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 482 (2009); June Carbone, *If I Say “Yes” to Regulation Today, Will You Still Respect Me in the Morning?*, 76 GEO. WASH. L. REV. 1747, 1762 (2008); Sherry Honeycutt Everett, *The Law of Alienation of Affections After McCutchen v. McCutchen: Breaking Up Just Got Harder to Do*, 85 N.C. L. REV. 1761, 1765 (2007); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Post-Modern Marriage Law*, 89 CAL. L. REV. 1479, 1597 & n. 158–59 (2001); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2050–57 (2000).

5. See, e.g., *supra* note 4 and text accompanying.

6. See *id.*

7. See *id.* For discussion of the role played by divorce reform in the ERA debate, see, for example, DONALD G. MATHEWS & SHERON DE HART, *SEX, GENDER, AND THE*

in dialogue with one another, the Article provides the first comprehensive history of the role of women, both feminists and antifeminists, in revolutionizing the law of marital property in the United States.

Moreover, as the Article will demonstrate, women's groups became involved and influential in the divorce debate because of, not in spite of, the ERA. In the early 1970s, women's groups like the National Organization for Women (NOW) did not focus on family law issues, be it in the context of the ERA or otherwise. However, between 1970 and 1975, anti-feminist organizations like STOP ERA and the Happiness of Women campaigned against the Amendment by highlighting its effects on divorce reform. By the late 1970s, NOW responded by campaigning for "pro-homemaker" divorce reforms: measures such as those calling for equal or equitable distribution of marital property and laws recognizing the contributions of homemakers in the division of marital property. These reforms themselves represent a revolution in divorce law. Equitable property division, rare in 1970, became the norm in all but ten states by the mid-1980s.<sup>8</sup> Whereas no states had property-division rules recognizing the contributions of homemakers in 1968, 22 states had adopted such a policy by 1983.<sup>9</sup>

By focusing primarily on the history of no-fault rules, current studies suggest that marital-property rules fail to protect women's interests partly because both progressive and conservative women remained largely uninvolved in debates about divorce reform.<sup>10</sup> Other scholars have argued that current marital-property reforms reflect the shortcomings of the formal-equality principles endorsed by second-wave feminists.<sup>11</sup> Instead of concerning themselves with equal outcomes after divorce, second-wave feminists sought primarily to ensure that marital property was evenly divided, an approach which, as we shall see, actually proved to disadvantage women.<sup>12</sup>

However, if one looks at the divorce revolution debate in the context of the ERA struggle, different issues emerge. As we shall see, feminists did seek to rework the law of marital property, but the battle for the ERA heav-

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POLITICS OF THE ERA: A STATE AND THE NATION 248 (1992); *see also* DONALD CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 225 (2005); FLORA DAVIS, MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960 389 (1999); DAVID FARBER, THE RISE AND FALL OF AMERICAN CONSERVATISM 145 (2010); ROSALIND ROSENBERG, DIVIDED LIVES: AMERICAN WOMEN IN THE TWENTIETH CENTURY 225 (2008).

8. *See, e.g.*, JACOB, *supra* note 4 at 122.

9. *See id.*

10. *See, e.g.*, Minow and Rhode, *supra* note 3 at 191, 195.

11. *See* MARTHA FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 4, 29, 33, 36, 47 (1991).

12. *See, e.g., id.* at 4, 29.

ily shaped the reforms they championed and the contentions they advanced. In particular, in countering the ERA-based claims made by antifeminists, feminists sought to establish that they deserved the support of homemakers and believed that homemakers' contributions and interests were as important as those of working women.

As the Article will show, by highlighting what homemakers did contribute to the marriage, feminists did not fully consider the contributions of wage-earning husbands or what counted as marital property in the first place. Specifically, the marital-property laws promoted by feminists (and ultimately adopted by many states) did not explicitly define a wage-earning husband's human capital—the future earning potential that both spouses helped to create—as a marital asset. This proved to be economically devastating to many women, since many courts have concluded that degrees or other sources of enhanced earning potential are not marital property,<sup>13</sup> notwithstanding the financial and non-financial contributions women made toward a degree from which they gained nothing, or the fact that such human capital<sup>14</sup> was and is the most economically significant asset in many marriages.<sup>15</sup> In short, feminists became involved in marital-property reform because of, not in spite of, the ERA. However, the ERA debate shaped the terms of the marital-property revolution, leaving a troubling legacy for women at divorce.

There is a good deal at stake in understanding the history of the divorce revolution. The history presented here offers the first in-depth account of the role of women, both feminists and antifeminists, in the divorce revolution. In so doing, the Article offers a more complete picture of that revolution, focusing on the understudied evolution of marital-property rules.

The Article also offers new perspective on the flaws in current marital-property rules. Since discussion in the 1970s focused so heavily on the value

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13. See, e.g., Alice Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self Over Marital Community*, 81 B.U. L. REV. 59, 71 (2001); Alicia B. Kelley, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 RUTGERS L. REV. 569, 584 n.76 (1999); see also Margaret Brining, *Property Distribution Physics: The Talisman of Time and the Middle Class*, 51 FAM. L. Q. 93, 105–07 (1997); Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L. Q. 119, 123–24 (1997).

14. On the evolution of human capital theory see, for example, Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investment in Human Capital*, 28 KAN. L. REV. 379, 381 (1980).

15. See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 163 (1991) ("By far the *most important property* acquired in the average *marriage* is its *career assets*, or *human capital*, the vast majority of which is likely to be invested in the husband").

homemakers contributed to marriage, the laws produced in that period did not adequately address the human capital brought to a marriage by the wage-earning husband. The history of marital-property reform makes apparent the need for statutes and judicial decisions that define marital property more expansively. The problem with current rules is not, as scholars have argued, that divorce reforms failed to consider women's needs. Instead, as we shall see, the problem was that women involved in divorce reform did not fully consider how those needs could best be addressed.

The Article unfolds in three parts. Part I lays out the concerns about sex discrimination at the heart of many debates about divorce law. The Article argues that a standard historical account of the divorce revolution is at work in these debates, and challenges several of this account's basic premises.<sup>16</sup> After setting aside these assumptions, Part II explores an alternative account of the divorce revolution, focusing on debate about marital-property reform in the ERA campaign. Part III considers the extent to which this debate impacted marital-property laws by analyzing three case studies from Virginia, Connecticut, and New York. Part IV examines the normative stakes of the history explored in the Article. Part V offers a brief conclusion.

### I. THE SILENT REVOLUTION REVISITED

The effect of divorce on homemaking spouses has remained a flashpoint for debate about family law, sex equality, and divorce.<sup>17</sup> In the academy, concerns about divorced homemakers and other women became central after the 1987 publication of Lenore Weitzman's *The Divorce Revolution: The Unexpected Consequences for Women and Children in*

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16. See JACOB, *supra* note 4, at 166–173.

17. For a sample of the scholarship on the impact of divorce on women and homemakers, see Katherine T. Bartlett, *Feminism and Family Law*, 33 FAM. L. Q. 475, 477–87 (1999) (summarizing feminist contributions to the divorce literature prior to 1999); see generally Williams, *supra* note 3; Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153 (1999); Milton Regan, *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303 (1994); Jane Rutherford, *Duty in Divorce: Shared Income as Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Katherine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Cythnia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 CHI. L. REV. 67 (1993); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1989); June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 HOUS. L. REV. 359 (1994); ANN ESTIN, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993).

America.<sup>18</sup> Weitzman's study reached several alarming conclusions: she found that judges tended to award women little or no alimony and less than 50% of the property acquired during marriage, and she argued that women suffered a significant decline in standard of living because of divorce.<sup>19</sup> Recently, in response to her critics, Weitzman has acknowledged that the decline in women's post-divorce standard of living was less dramatic than she originally suggested.<sup>20</sup>

There remains, however, a firm consensus that divorce hurts homemakers.<sup>21</sup> Although family court practices have become somewhat more just over the past twenty years,<sup>22</sup> women still tend to suffer a substantial decrease in standard of living after divorce.<sup>23</sup> Estimates of the decrease range from 15 to 27%.<sup>24</sup> Alimony awards are rare and, when offered, often inadequate.<sup>25</sup> Most scholars agree that "divorce under the new divorce laws has been economically devastating for many women and children."<sup>26</sup>

For most critics, the only response is to create laws that explicitly recognize the needs of homemaking spouses. In the alimony context, some commentators propose new theories of alimony that will justify awards to deserving homemakers, relying on principles of contract, partnership, or human capital.<sup>27</sup> Others emphasize the bargaining disadvantages that homemaking spouses face in divorce settlements because, intent on gaining custody of children, they may be willing to give up a considerable amount of property to which they are otherwise entitled.<sup>28</sup> These scholars argue for new procedural rules governing divorce settlements.<sup>29</sup> Still other critics stress narrow but concrete reforms, such as the introduction of equal, rather than

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18. See generally WEITZMAN, *supra* note 1.

19. See *id.* at 46–49, 70–76, 104–09.

20. See Lenore Weitzman, *The Economic Consequences of Divorce Are Unequal*, 61 AM. SOC. REV. 538 (1996).

21. See *infra* notes 22 & 24 and text accompanying.

22. J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419, 429–435 (2008).

23. See Peterson, *infra* note 24 and text accompanying.

24. Richard Peterson, *A Reevaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 528–30 (1996) (summarizing study results).

25. See, e.g., Williams, *supra* note 3, at 2231; Minow & Rhode, *supra* note 3, at 191, 202.

26. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 869 n.171 (2004).

27. See, e.g., Williams, *supra* note 3, at 2229; Ellman, *supra* note 17, at 4–7; Martha Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 83 (2001); Mary O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 439 (1988).

28. E.g., Bryan, *supra* note 17, at 1179.

29. *Id.* at 1270–73.

equitable, property division.<sup>30</sup> A second body of work focuses on redefining marriage, both in theory and in the courts.<sup>31</sup>

Many studies link the shortcomings of the present rules to the historical period that produced them. Scholars have focused primarily on the introduction of no-fault rules and have concluded, as stated by Herma Hill Kay, that the harms to homemakers were “an unanticipated cost” of the revolution.<sup>32</sup> Ira Mark Ellman agrees that the divorce revolution was motivated not by concern for homemakers but entirely “by a desire to end the charade of perjured testimony and falsified residency that permeated consent divorces under the fault system.”<sup>33</sup> Cynthia Starnes similarly attributes the mistreatment of homemakers to the 1970s no-fault ideology that “[e]ach spouse deserves a fresh start, a clean break.”<sup>34</sup> In criticizing current divorce practices, Martha Minow and Deborah Rhode have emphasized that women’s groups and concerns played at most a minimal role in the no-fault revolution.<sup>35</sup>

Many of these critics rely on a shared historical account of divorce reform, one heavily focused on the introduction of no-fault rules.<sup>36</sup> The main premise of this account is that the divorce revolution was silent, uncontroversial, and unacknowledged.<sup>37</sup> The issue of divorce reform is argued to have produced little public debate and media coverage.<sup>38</sup>

The divorce revolution is supposed to have been silent for several reasons. First, divorce reforms were presented as codifications or slight modifications of the legislative status quo.<sup>39</sup> This strategy is argued to have had several advantages. Because reformers could claim that their bills would be

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30. See, e.g., Cynthia Lee Starnes, *Victims, Breeders, Joy and Math: First Thoughts on Compensatory Spousal Payments Under the Principles*, 8 DUKE J. GENDER L. & POL’Y 137, 138–147 (2001) (recommending equal sharing between spouses of gains produced by marriage, irrespective of remarriage, childbearing, or length of marriage); Penelope Eileen Bryan, *Vacant Promises? The ALI Principles of the Law of Family Dissolution and the Post-Divorce Financial Circumstances of Women*, 8 DUKE J. GENDER L. & POL’Y 167 (2001).

31. See, e.g., Carolyn Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982).

32. See Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 292–93 (1987).

33. See Ellman, *supra* note 17, at 7.

34. Cynthia Lee Starnes, *Mothers, Myths, and the Law of Divorce: One More Feminist Case for Partnership*, 13 WM. & MARY J. WOMEN & L. 203, 218–20 & nn.87–89 (2006–07).

35. See Minow & Rhode, *supra* note 3, at 191, 195.

36. See, e.g., *supra* note 4 and text accompanying.

37. See, e.g., JACOB, *supra* note 4, at 8–16.

38. See *id.* at 170–71.

39. See *id.* at 169.



compatible with existing law, the public saw divorce reform as a “low-risk venture,” and citizens saw little reason to protest the perceived changes.<sup>40</sup> Existing laws enjoyed a presumption of legitimacy.<sup>41</sup> Proposed “codifications” or “modifications” promised to change very little and consequently provoked little popular dissent.<sup>42</sup>

Second, the reforms in question were presented as so complex that only family law experts could credibly debate them.<sup>43</sup> Family law experts “often claimed a special prerogative to mold the new divorce laws because of their expertise with the legal system.”<sup>44</sup> This was especially the case for marital-property rules, which were perceived to be obscure and complex.<sup>45</sup>

Finally, social movements and interest groups, especially feminist and anti-feminist ones, had a minimal impact on the divorce revolution, primarily because both sides were preoccupied by the struggle for the ERA.<sup>46</sup> The lack of interest-group involvement is often attributed partly to a successful strategy employed by family law experts, who made the issue of divorce reform seem technical and low-stakes.<sup>47</sup> According to the conventional historical account, those promoting no-fault reform framed the issue in a way that minimized public controversy, keeping it in “the shadow of deep obscurity and flourishing there.”<sup>48</sup>

According to the conventional account, the lack of interest-group involvement was also due partly to luck.<sup>49</sup> “The feminists who might otherwise have been attracted to divorce law reform were preoccupied with the Equal Rights Amendment, abortion, and other issues.”<sup>50</sup> No-fault divorce was not part of the feminist agenda.<sup>51</sup> When feminists did express concern, as was the case with the framing of the Uniform Marriage and Divorce Act, they are argued to have been unsuccessful in having their views adopted.<sup>52</sup>

Herbert Jacob’s explanation for the irrelevance of women’s groups is representative. Consider his account of the introduction of reform in Illinois: “In Illinois, the attention of feminists was riveted on obtaining ratifica-

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40. *See id.* at 169–70.

41. *See id.* at 170.

42. *See id.* at 168–70.

43. *See id.*

44. *See id.* at 169.

45. *See id.* at 168–70.

46. *See id.* at 168–69.

47. *See id.* at 168–71.

48. *See id.* at 170.

49. *See id.* at 168.

50. *See id.* at 169.

51. *See id.* at 84–85.

52. *See id.*

tion of the ERA from the legislature, an effort that ultimately failed but which drained all energy from alternative agendas.”<sup>53</sup>

This account is correct insofar as it addresses the introduction of no-fault divorce itself. But the traditional account focuses narrowly on the introduction of no-fault rules. If we broaden our inquiry, we will see that women’s concerns and women’s groups did play a significant part in divorce reform, especially in regard to rules governing alimony and the distribution of marital-property. Part II explores the frustrations with, ambitions for, and debates about homemakers’ concerns, developing a fuller historical account of the divorce revolution.

## II. THE HOMEMAKER QUESTION: DIVORCE AND THE ERA

In 1970, California became the first state to introduce “no-fault” divorce, which was available unilaterally when one spouse did no more than cite irreconcilable differences.<sup>54</sup> In the same year, at the fourth annual national conference of the National Organization for Women, the nation’s largest women’s organization, the issue of divorce reform was notably absent.<sup>55</sup> The main issues considered by the group included “the Political Clout of Women’s Liberation” and “How to Fight Job Discrimination.”<sup>56</sup> Some activists did discuss family law issues, such as the need for publicly funded daycare and the best strategy for redefining marriage.<sup>57</sup> As we shall see, however, NOW leaders primarily discussed these issues only insofar as they related to the needs of women working outside the home. As NOW activists explained in 1970, the organization “aimed at changing not only discriminatory laws but the entire concept of man as bread-winning, decision-making head of household and woman as his subordinate helpmate.”<sup>58</sup>

NOW was certainly not the only influential women’s organization in the period, or the only group critical of traditional gender roles in the family. The Redstockings, a group committed to direct-action protest, suggested that in traditional marriages women were exploited as “sex objects,

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53. See *id.* at 98.

54. See Steven Roberts, *Divorce, California Style, Called A Reflection of the Restless West*, N.Y. TIMES, Jan. 1, 1970, at 14.

55. See, e.g., Deirdre Carmody, *Women’s Group Sees Widespread Gains in Drive for an Equal Role*, N.Y. TIMES, Mar. 23, 1970, at 32; Judy Klemesrud, *NOW’s New President Sees Men Helped, Too*, N.Y. TIMES, May 2, 1970, at 36.

56. See *What Is New Direction for Feminist Movement?*, CHI. DAILY DEFENDER, Mar. 21, 1970, at 22.

57. See *id.*

58. See Carmody, *supra* note 55.

breeders, servants, and cheap labor.”<sup>59</sup> The Feminists, a splinter group of former NOW members, formally opposed the institution of marriage and staged protests that labeled marriage a form of slavery.<sup>60</sup>

Nonetheless, there are several reasons to focus on NOW’s role in divorce reform. Unlike many radical organizations, NOW worked primarily at the national level, and its members were skilled at lobbying or otherwise “working within the system” to achieve law reform.<sup>61</sup> Moreover, other mainstream national organizations, like the National Women’s Political Caucus, were not active throughout the entire period studied here and tended to focus more narrowly on elections and party politics.<sup>62</sup>

NOW initially showed little interest in the rights of homemakers. Formed in 1967 by Betty Friedan, an influential feminist and the author of *The Feminine Mystique*,<sup>63</sup> NOW’s goals reflected Friedan’s well-known critique of the roles women were expected to play in the home and the family.<sup>64</sup> For example, Alice Rossi and the first NOW Task Force on the Family proposed the following as a “guiding ideology”: “NOW should seek and advocate personal and institutional measures which would reduce the disproportionate involvement of men in work at the expense of meaningful participation in family and community, and the disproportionate involvement of women in family at the expense of participation in work and community.”<sup>65</sup> NOW’s ideology recognized the importance of divorce reform and the legal proposals related to it, but did so primarily to reinforce other measures intended to end employment discrimination.<sup>66</sup>

The concrete proposals made by NOW in 1967 reflected a similar point of view. These proposals included: the subsidization of child care, the introduction of no-fault divorce, the revision of tax laws to allow deductions for homemaking and child-care services for working women, revision of Social Security laws to expand coverage for widowed and divorced women,

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59. See Susan Brownmiller, *‘Sisterhood Is Powerful’: A Member of the Women’s Liberation Movement Explains What It’s About*, N.Y. TIMES, Mar. 15, 1970, at 230.

60. See *id.*

61. For a contemporary account to this effect, see MAREN LOCKWOOD CARDEN, *THE NEW FEMINIST MOVEMENT* 103–18 (1974). For more on the differences between NOW and radical feminist organizations see, for example, NANCY WHITTIER, *FEMINIST GENERATIONS: THE PERSISTENCE OF THE RADICAL WOMEN’S MOVEMENT* 4 (1995); BARBARA RYAN, *IDENTITY POLITICS IN THE WOMEN’S MOVEMENT* 181–82 (Barbara Ryan ed. 2001).

62. See, e.g., CARDEN, *supra* note 61, at 139–43.

63. See BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

64. See, e.g., *infra* note 65 and text accompanying.

65. See NOW Task Force on The Family, Proposed Guidelines (n.d.) (1967) (on file with The NOW Papers, Box 47, Folder 42, Schlesinger Library, Harvard University).

66. See *id.*

and laws prohibiting pregnancy discrimination and guaranteeing family medical leave.<sup>67</sup>

Indeed, before 1973, NOW's family law reform agenda focused not on homemakers but on the redefinition of marriage and the creation of publicly funded daycare. The organization's interest in public daycare became stronger in 1970 after the beginning of the White House Conference on Children and Youth.<sup>68</sup> In 1970, Florence Dickler, the leader of the NOW Child Care Task Force, explained that the Conference offered a perfect opportunity to make child care a national priority.<sup>69</sup> Moreover, as Dickler explained to Wilma Scott Heide, NOW's then President, the Conference would give NOW a chance to set the terms of the daycare debate.<sup>70</sup>

For this purpose, Dickler and other members of the Task Force prepared a position paper designed to frame the debate, entitled "Why Feminists Want Child Care."<sup>71</sup> The first key argument in the paper explained that daycare was an issue of women's rights: "Women will never have full opportunities to participate in our economic, political, [and] cultural life as long as they bear [child-care] responsibilit[ies] almost entirely alone."<sup>72</sup> A second key argument challenged the idea that women's biology was their destiny.<sup>73</sup> The paper attacked the notion that, "because women bear children, it is primarily [women's] responsibility to care for them, and even that this ought to be the chief function of a mother's existence."<sup>74</sup> As Dickler's position paper suggested, in the early 1970s, NOW challenged conventional arguments about the unique value of homemakers as mothers.<sup>75</sup>

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67. *See id.*

68. On the nature of the 1970 White House Conference on Children see, for example, Nan Robertson, *Parley on Young Begins Its Work*, N.Y. TIMES, Dec. 15, 1970, at 57; James McNaughton, *White House Plans Conference of, by, and for Youth*, N.Y. TIMES, June 12, 1970, at 18.

69. *See* Mary Ziegler, *The Bonds That Tie: Abortion and the Politics of Motherhood*, 21 TEX. J. WOMEN & L. 47, 54 (2011). For an articulation of NOW's positions on daycare, see *Why Feminists Want Child Care* (1970) (on file with The NOW Papers, MC 496, Box 98, Folder 12, Schlesinger Library, Harvard University).

70. *See* Ziegler, *supra* note 69 at 54.

71. *See id.* at 54–55.

72. *See id.* at 55.

73. *See id.*

74. *See id.*

75. *See id.* For further discussion of feminist demands for universal daycare in the period, see, for example, Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism, 1966–1974*, 28 LAW & HIST. REV. 577 (2010); Ziegler, *supra* note 69.

In the same period, NOW members considered a proposal to redefine marriage as a truly and almost exclusively contractual matter.<sup>76</sup> Under the proposal, the institution of marriage would have no fixed terms.<sup>77</sup> Instead, potential spouses would have to agree contractually before marriage about how household chores, financial burdens, and child-care responsibilities would be divided during marriage, and how property would be divided upon divorce.<sup>78</sup>

However, in the early 1970s, dissenters within the organization demanded that NOW focus more on family law in general and in particular on the needs of homemakers in divorce. The activist who arguably played the largest role in shaping this debate was Betty Berry, the coordinator of New York NOW's Committee on Marriage and Divorce.<sup>79</sup> Berry approached the NOW National Board in September 1970 after Board members defeated resolutions calling for educational programs for homemakers and a bill of rights for married women.<sup>80</sup> Berry recognized that “[w]omen’s organizations [had] made great strides in the last two years in employment rights, abortion law repeal and the establishment of day care centers.”<sup>81</sup> However, Berry noted that NOW was “one of the few women’s organizations that [did] anything about the rights of the housewife or divorced women.”<sup>82</sup> She offered several ways that NOW could assist homemakers.<sup>83</sup> Berry argued it was most urgent that the organization seek to reform property-division laws in place in 42 common-law property states.<sup>84</sup> In the early 1970s, common-law states allocated property acquired during a marriage to the holder of legal title.<sup>85</sup> Berry argued that under such a regime wives functionally “forfeited their ability to earn money and accumulate property.”<sup>86</sup>

Berry expressed further concern about the elimination or reduction of alimony awarded to women. In Berry’s view, liberal alimony rules were “im-

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76. See Nan Wood, Proposed Resolution on the Marriage Contract (1976) (on file with The NOW Papers, MC 496, Box 5, Folder 2, Schlesinger Library, Harvard University).

77. *Id.*

78. *Id.*

79. See Betty Berry, Report of New York NOW Committee on Marriage and Divorce (Sept. 1970) (on file with The Elizabeth Spalding Papers, MC 482, Box 3, Folder 7, Schlesinger Library, Harvard University).

80. *Id.*

81. *Id.* at 1.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *id.* For further discussion of the workings of common-law requirements at the time, see, for example, JOANNA GROSSMAN & LAURENCE FRIEDMAN, *INSIDE THE CASTLE: LAW AND FAMILY IN TWENTIETH CENTURY AMERICA* 175 (2011).

86. See Berry, *supra* note 79, at 2.

perative” until “such time as housewives [were] compensated for their time.”<sup>87</sup> She proposed several reforms designed to recognize homemakers’ contributions, including equal division of marital property, rules restructuring “alimony as a pension or deferred compensation, and rules making it easier for homemakers to access Social Security and pensions before and after divorce.”<sup>88</sup>

Partly because of Berry, New York became the center of the marital-property debate between women’s groups in the early 1970s. In January 1972, when a group of attorneys held a hearing on the potential financial impact of new, no-fault reforms, members of New York NOW turned the hearing into a consciousness-raising session, stressing the plight of homemakers and the need for marital-property reforms that would benefit them.<sup>89</sup> At this hearing, NOW’s founder Betty Friedan argued that no-fault reforms should be accompanied by property rules recognizing “the reality today [. . .] that most wives [were] not equipped to earn adequate livings for themselves.”<sup>90</sup>

The efforts of Berry and other NOW activists in New York culminated in the 1972 introduction of New York NOW’s “Equal Rights Divorce Reform Bill,” written by Berry. The Bill called for equal division of marital property, equitable alimony with cost of living increases, and state-funded training programs for divorced or separated homemakers.<sup>91</sup> Berry’s concrete proposals were complex. She called for the equal distribution of marital property but approved of the newly-proposed measures of the Uniform Marriage and Divorce Act supporting equitable division, which permitted a judge to determine which property was acquired during a marriage and to divide that property according to his own sense of fairness.<sup>92</sup> Her major criticisms were reserved for the existing system, which allocated property according to formally held title.<sup>93</sup> As for alimony, Berry recognized that some form would be necessary—whatever its justification—especially for

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87. *Id.* at 7.

88. *Id.*

89. See Leslie Oelsner, *Hearing on the Fiscal Side of Divorce*, N.Y. TIMES, Jan. 14, 1972, at 29.

90. *Id.*

91. See New York City NOW, Equal Rights Divorce Reform Bill (1974) (on file with The Elizabeth Spalding Papers, MC 482, Box 3, Folder 7, Schlesinger Library, Harvard University); see also Betty Berry, An Explanation of No-Fault Divorce (Feb. 20, 1973) (on file with The Elizabeth Spalding Papers, MC 482, Box 3, Folder 7, Schlesinger Library, Harvard University).

92. See Berry, *supra* note 79, at 1–6.

93. See Betty Berry, Suggested Guidelines in Studying and Comments on the Uniform Marriage and Divorce Act (1971) (on file with The NOW Papers, MC 496, Box 42, Folder 43, Schlesinger Library, Harvard University).

divorced women with no job experience or marketable skills,<sup>94</sup> older women, and those who carried on as homemakers after divorce.<sup>95</sup> She argued that “the time is long overdue to establish clearly a financial formula for compensating the dependent housewife in and after marriage,” and that states should use alimony until other “viable financial safeguards” were in place.<sup>96</sup>

In spite of Berry’s urging, NOW did not make divorce reform a central legal priority at that time. As Herbert Jacob and others argue,<sup>97</sup> the organization’s central priority was the ratification of the Equal Rights Amendment. Even the other goals pursued by NOW had little to do with homemakers’ rights. For example, in 1970, with the election of Aileen Hernandez, the organization confirmed its emphasis on employment equality.<sup>98</sup> A former member of the Equal Employment Opportunity Commission, Hernandez described NOW’s goals as: “the repeal of abortion laws, free day care centers where mothers who work can leave their children, equal employment opportunities for women, passage of the Equal Rights Amendment [. . .], and getting a woman on the Supreme Court.”<sup>99</sup>

Another example was the organization’s 1971 national conference, which had a “political thrust” and focused on the “need to elect feminist men and women to office.”<sup>100</sup> Beginning in 1972, the organization was also partly focused on how to deal with the growing prominence of lesbians—the “lavender menace,” as Betty Friedan said—in the women’s movement.<sup>101</sup> At the 1973 National Conference, NOW focused on alliance-building with other groups—including men, civil rights’ organizations, and poverty-rights activists.<sup>102</sup> The underlying priorities endorsed by the organization remained the same, challenging “the traditional separate roles played by men and women, and [analyzing] how these ought to be changed.”<sup>103</sup>

94. See Betty Berry, Report of NOW - N.Y. Marriage and Divorce Committee, 8 (Aug. 1971) (on file with The NOW Papers, MC 496, Box 47, Folder 44, Schlesinger Library, Harvard University).

95. See Berry, *supra* note 93.

96. See Berry, *supra* note 94, at 2.

97. See, e.g., JACOB, *supra* note 4, at 125.

98. See Klemesrud, *supra* note 55, at 36.

99. *Id.*

100. See, e.g., *Women’s Liberation Unit Seeks Widening Drive for Justice*, N.Y. TIMES, Sep. 12, 1971, at 26.

101. See, e.g., Enid Nemy, *The Movement is Big Enough to Roll With All Those Punches*, N.Y. TIMES, Oct. 2, 1972, at 46. For Friedan’s use of the term “lavender menace,” see, for example, DAVIS, *supra* note 7, at 263.

102. See, e.g., *Women’s Group Re-Elects Its President*, N.Y. TIMES, Feb. 19, 1973, at 12.

103. *Id.*

Moreover, in campaigning for the ERA, NOW rarely discussed its effect on homemakers or the ways in which the Amendment might potentially benefit them. Instead, like other major national organizations involved in the ERA campaign, NOW focused on the Amendment's likely effects on employment discrimination, particularly the kind produced by so-called protective labor legislation.<sup>104</sup> "Special 'protective' labor legislation limited the number of hours that women, but not men, could work."<sup>105</sup> Feminists were divided in the period about whether protective labor legislation furthered women's equality or undermined it.<sup>106</sup> Indeed, in the 1970s, ERA opponents raised arguments against the Amendment based on its effects on such legislation; for example, Myra Wolfgang, one of the heads of the Restaurant Employees and Bartenders' Union and a key opponent of the ERA, told the *Chicago Tribune* in 1970, "[t]he principal victims" of the Amendment would be "mothers who are employed outside the home."<sup>107</sup>

There were several reasons why the ERA debate focused on protective labor law. Beginning with Alice Paul, ERA proponents emphasized the harm done by such laws to working women.<sup>108</sup> Supporters like Gale Carrigan of the United Auto Workers' Women Department echoed such claims, suggesting that "[o]ur experience has proven to us that those so-called 'protective' laws are the real deterrents to obtaining equal pay and equal opportunity for working women."<sup>109</sup> Proponents of the ERA also used protective labor arguments to counter opposition claims that the ERA was unnecessary because of the protections available under the Fourteenth Amendment and Title VII of the Civil Rights Act.<sup>110</sup> An anti-ERA editorial published by the *Los Angeles Times* summarized these opposition arguments as follows: "[a]s a device for achieving certain useful changes in law, the amendment is not

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104. See *The "Equal Rights" Amendment: Hearings Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary*, 91st Cong. 25 (1970) (statement of Representative Martha Griffiths focusing on the ERA's likely impact on protective labor legislation).

105. Deborah Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 736 (2012).

106. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 121 (2010).

107. *Rights Bid Held Peril to Women*, CHI. TRIB., Sep. 10, 1970, at D1.

108. See, e.g., NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 115–143 (1987).

109. *Rights for Working Women*, WASH. POST, Sep. 15, 1970, at B4.

110. The need to refute these arguments became especially strong after 1971, when the Supreme Court began interpreting the Fourteenth Amendment to prohibit some sex-based classifications. See *Reed v. Reed*, 404 U.S. 71 (1971). Martha Griffiths, a leading proponent of the ERA, could argue only that the *Reed* standard was unclear and would lead to "lawsuits after lawsuits." Robert Hey, *Court Ruling Affects Women's Rights Bill*, CHRISTIAN SCI. MONITOR, Nov. 26, 1971, at B6.



necessary. These changes can be achieved—they are being achieved—by less dramatic measures.”<sup>111</sup>

Perhaps most importantly, the emphasis on protective labor laws reflected that employment law was an organizational priority of major national women’s organizations like NOW. Betty Friedan’s comments in a 1973 *New York Times* editorial were representative: “[f]or women to have full human identity and freedom, they must have economic independence.”<sup>112</sup>

However, in the same year, NOW addressed the issue of no-fault divorce for the first time. Above all, the national organization stressed that it would oppose no-fault reforms unless adequate economic safeguards for women and children were introduced, although the organization laid out both benefits and drawbacks associated with reform.<sup>113</sup> NOW also adopted a number of more concrete proposals, including laws ordering the equal division of marital property in all states or requiring the payment of “equitable” alimony as compensation for past, unpaid labor.<sup>114</sup>

While national NOW did publicly discuss the issue of no-fault divorce in 1973, the organization did little to draw public attention to the issue or to campaign for reform of marital-property laws in the states. In the summer of 1974, Elaine Forthoffer wrote to the national NOW Board with the following concern: “The current emphasis on eliminating discrimination against women in the job market, while valid, obscures the right of wives to opt for homemaking as their primary vocation—in fact, not only obscures but threatens such right.”<sup>115</sup>

NOW’s 1974 presidential election offers some sense of why advocates like Forthoffer were concerned. Even though the vast majority of states still applied rules that disadvantaged homemakers upon divorce, neither major 1974 NOW presidential candidate expressed interest in divorce or homemakers’ rights.<sup>116</sup> In 1975, NOW elected new officers, agreeing that ERA ratification would be a primary goal of the organization and passing a reso-

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111. See James Kilpatrick, *Women Don't Really Need An Equal Rights Amendment*, L.A. TIMES, Oct. 25, 1971, at C7.

112. Betty Friedan, *Up From the Kitchen Floor*, N.Y. TIMES, Mar. 4, 1973, at 246.

113. See, e.g., Vera Glaser, *The Case Against No-Fault Divorce*, CHI. TRIB., Sep. 27, 1973, at B3; see also National Conference Resolution (Feb. 1973) (on file with The NOW Papers, MC 482, Box 3, Folder 17, Schlesinger Library, Harvard University).

114. See, e.g., Glaser, *supra* note 113, at B3.

115. Elaine Forthoffer to Liz Spalding (Aug. 1974) (on file with The NOW Papers, MC 496, Box 47, Folder 45, Schlesinger Library, Harvard University).

116. See, e.g., *Election and Debate on Agenda as NOW Begins Convention*, N.Y. TIMES, May 26, 1974, at 35; Laurie Johnston, *NOW Elects Syracuse Lawyer as Head*, N.Y. TIMES, May 28, 1974, at 29; *Revamp Work Ethic, NOW Chief*, CHI. TRIB., Jun. 2, 1974, at 18.

lution stating that lesbian equality was a “national priority of the organization.”<sup>117</sup>

By 1975, in spite of the best efforts of activists like Berry, NOW had paid little attention to homemakers. Within a short time, however, NOW would become fully engaged with issues related to homemakers’ rights.

#### A. *Libbers Against Homemakers, 1973–1975*

The ERA struggle geared up in early 1972, as organized opposition to the Amendment became more vocal and threatened the success of the Amendment in unratified states.<sup>118</sup> These grassroots opponents made divorce reform a central part of the ERA debate.

This shift in the ERA discussion began with the formation of women’s groups opposed to the ERA and the feminist movement. These organizations first appeared on the national stage in the spring of 1972.<sup>119</sup> Founded in Kingman, Arizona, by Jacquie Davison, Happiness of Women (HOW) was formed after the Senate passed the ERA, and the group had 3,000 members by April.<sup>120</sup> As Davison explained to the *Chicago Tribune* that year, the group had formed so that housewives could “pull on the combat boots and battle those dragging the word ‘housewife’ through the mud.”<sup>121</sup> A similar organization, the Anti-Women’s Liberation League, was formed by J. J. Jarboe in San Francisco in the same period.<sup>122</sup> Jarboe opposed the ERA because the Amendment would take “away things most women cherish—like [. . .] the right to alimony and child custody in divorce.”<sup>123</sup>

The most famous of these organizations, STOP ERA, founded in 1972 by Phyllis Schlafly, led efforts to focus the ERA debate on divorce reform.<sup>124</sup> As early as May 1972, Schlafly prominently argued, “[the] ERA will wipe out the financial obligation of a husband and a father to support

117. *NOW Elects New Officers Pledged to Expand Group’s Activities*, N.Y. TIMES, Oct. 28, 1975, at 15.

118. See, e.g., Patricia McCormack, *Housewives Make “Life Worth Living,”* CHI. TRIB., Apr. 2, 1972, at 14; Carolyn Toll, *Californian Pushes for Anti-Lib*, CHI. TRIB., Apr. 20, 1972, at 2; *They Enjoy Being Just Girls*, HARTFORD COURANT, Apr. 5, 1972, at 6.

119. See, e.g., *supra* note 118 and text accompanying.

120. See McCormack, *supra* note 118, at 14.

121. *Id.*

122. See Toll, *supra* note 118.

123. *Id.*

124. *Chronology of the Equal Rights Amendment, 1923–1996*, The Nat’l Org. for Women, available at [www.now.org/issues/economic/cea/history.html](http://www.now.org/issues/economic/cea/history.html) (last visited June 20, 2012) (mentioning the founding of STOP ERA).

his wife and children, the most important of all women's rights."<sup>125</sup> In 1973, she cited cases from Colorado and Pennsylvania, both of which had state ERAs, allegedly forcing wives as well as husbands to pay spousal maintenance after divorce.<sup>126</sup>

By July 1974, the *Washington Post* had identified Schlafly as "the standard-bearer" of the ERA opposition.<sup>127</sup> In the same year, Schlafly reiterated her position that the ERA would "degrade the homemaker role, and support economic development requiring women to seek careers."<sup>128</sup> In a later interview, a reporter asserted that Schlafly "look[ed] surprised when someone point[ed] out that her major objection to the ERA is that it might deprive some women of alimony."<sup>129</sup> She elaborated on these worries in a 1975 edition of *The Phyllis Schlafly Report*, arguing that ERA proponents "tipped their hand" by introducing "specific bills on family support [. . .] in various state legislatures."<sup>130</sup> She told her readers how they could determine what the Equal Rights Amendment truly meant and what its consequences would be:

All this *specific* legislation supported by the ERA proponents in the various state legislatures proves that—despite their denials when they are talking in the press ERA proponents are working assiduously to make the financial obligation for family support fall equally on the wife . . .<sup>131</sup>

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125. Phyllis Schlafly, *The Fraud Called the ERA*, THE PHYLLIS SCHLAFLY REPORT (Eagle Forum, Alton, Ill.), May 1972, at 1 (on file with The Phyllis Schlafly Report Collection, Schlesinger Library, Harvard University).

126. See Phyllis Schlafly, *Effect of ERA on Family Property Rights*, THE PHYLLIS SCHLAFLY REPORT (Eagle Forum, Alton, Ill.), Nov. 1973, at 1 (on file with The Phyllis Schlafly Report Collection, Schlesinger Library, Harvard University).

127. See Sally Quinn, *Phyllis Schlafly: Sweetheart of the Silent Majority*, WASH. POST, July 11, 1974, at D1; see also Eileen Shanahan, *Opposition Rises to Amendment on Equal Rights*, N.Y. TIMES, Jan. 15, 1973, at 63.

128. See *Effect of ERA on Family Property Rights*, THE PHYLLIS SCHLAFLY REPORT (Eagle Forum, Alton, Ill.), Jan. 1974, at 1 (on file with The Phyllis Schlafly Report Collection, Schlesinger Library, Harvard University) (quoting Arthur E. Ryman, Jr., *Comment on Family Property Rights and the Proposed 27th Amendment*, 22 DRAKE L. REV. 505, 514 (1972–1973)).

129. See Quinn, *supra* note 127.

130. See *The Hypocrisy of ERA Proponents*, THE PHYLLIS SCHLAFLY REPORT (Eagle Forum, Alton, Ill.), July 1975, at 2 (on file with The Phyllis Schlafly Report Collection, Schlesinger Library, Harvard University).

131. *Id.*

Schlafly's arguments resonated with homemakers.<sup>132</sup> As Deborah Rhode explains: "To traditional homemakers, a constitutional mandate seemed to offer an unnecessary and unwelcome exchange: they would pay the price of expanding some abstract set of opportunities that they had never experienced and would never enjoy."<sup>133</sup>

### B. *Valuing the Homemaker, 1975–1983*

Advocates within NOW verbalized the threat posed by STOP ERA and its appeal to homemakers. In order to succeed in the ERA struggle, as prominent NOW member Toni Carabillo stated in a confidential strategy memorandum, NOW had to show that STOP ERA "deserve[d] neither credibility nor trust" when its members claimed to be "homemakers' champion[s] and defender[s]."<sup>134</sup> In order to accomplish this task, in 1975 the NOW Task Force on Marriage and Divorce proposed a comprehensive legal-reform program concerning divorce, marital property, and displaced homemakers.<sup>135</sup>

The NOW Task Force Report ("the Report") took positions on the ownership and division of marital property in both community property and common law states.<sup>136</sup> In community property states—where property acquired during marriage belongs to both spouses and is divided equally upon divorce—the Report recommended that states permit the joint management and control of property while marriages were intact.<sup>137</sup> In common-law property states—where most courts still awarded property according to title—the Report demanded that homemakers' contributions be recognized in some way.<sup>138</sup> Although stating preference for the equal division of marital property, the Report also endorsed measures intended to guide judges in equitably dividing marital property.<sup>139</sup> In particular, the Re-

132. See DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 66 (1991).

133. *Id.*

134. Memorandum from Tony Carabillo, "Who Really Cares About Housewives?" (1977) (on file with The NOW Papers, MC 496, Box 192, Folder 32, Schlesinger Library, Harvard University).

135. See Elizabeth Coxe Spalding, *First Report to the National Task Force on Marriage and Divorce*, Feb. 1975, at 2 (on file with The NOW Papers, Box 47, Folder 45, Schlesinger Library, Harvard University); see also Memorandum from Toni Carabillo, "The Homemaker and the Woman's Movement," (1977), at 1–2 (on file with The NOW Papers, MC 496, Box 46, Folder 42, Schlesinger Library, Harvard University).

136. See *First Report to the National Task Force on Marriage and Divorce*, *supra* note 135, at 1–10, 16–17, 19.

137. See *id.* at 2.

138. See *id.* at 2–3.

139. See *id.* (praising states that allowed equitable division).

port stressed that it was important for these guiding measures to explicitly mention the non-monetary contributions of homemakers as a factor for judges to consider in dividing marital property.<sup>140</sup> Ten years later, all of these reforms had either been adopted at the federal level or had passed in more than twenty states.<sup>141</sup>

In order to build further support among homemakers for the ERA, NOW began sponsoring homemaker-related reforms in Congress: measures permitting divorced or widowed homemakers to create retirement pensions, receive Social Security payments, or benefit from vocational or educational programs after divorce.<sup>142</sup> Two so-called “displaced homemakers,” Tish Sommers and Laurie Shields, had campaigned successfully for a post-divorce training law in California in the mid-1970s.<sup>143</sup> In the same period, Sommers and Shields became the heads of the Task Force on Older Women.<sup>144</sup> As the heads of the Task Force, Shields and Sommers emphasized the economic impact of divorce on homemakers, especially those too young to receive Social Security benefits and too old to receive the kinds of assistance available to younger mothers, like that offered by Aid to Families with Dependent Children.<sup>145</sup> Within two years of the passage of the California law, twenty-eight states had introduced similar displaced-homemaker laws, and the federal Department of Labor had authorized \$15 million for similar training and educational programs.<sup>146</sup>

The changes within NOW soon became apparent outside the context of the organization’s Task Force on Older Women. In 1977, Eleanor Smeal, a homemakers’ rights activist and housewife, became President of the NOW National Board.<sup>147</sup> As President, Smeal began by creating a Homemakers’

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140. *See id.*

141. *See, e.g.*, JACOB, *supra* note 4, at 122.

142. *See* Sample Letter from Arlie Scott, Vice President, Action, National Organization for Women, Inc., to Member of Congress on Displaced Homemaker Legislation (May 1, 1978) (on file with The NOW Papers, MC 496 Box 46, Folder 2, Schlesinger Library, Harvard University).

143. *See* Judy Mann, *National Alliance*, L.A. TIMES, Nov. 16, 1978, at H17.

144. *See id.* on the role of Sommers and Shields. On their co-chairmanship of the Task Force on Older Women see, for example, BARBARA LOVE, *FEMINISTS WHO CHANGED AMERICA 1963–1975* 434 (2006); On Sommers’ leadership of the Task Force and subsequent history see, for example, *Tish Sommers Dies: Led Older-Women’s Unit*, N.Y. TIMES, Oct. 19, 1985, at 32.

145. *See, e.g.*, Sample Letter from Arlie Scott to Member of Congress, *supra* note 142; Letter from Tish Sommers and Laurie Shields, Co-Coordinator, Task Force on Older Women, to Eleanor Smeal (Apr. 27, 1977) (on file with The NOW Papers, MC 496, Box 46, Folder 40, Schlesinger Library, Harvard University).

146. *See* Mann, *supra* note 143, at H17.

147. *See, for example*, Margaret Mason, *Ellie Smeal, The First Housewife President of NOW, Is a Complex and Powerful Personality*, WASH. POST, Nov. 17, 1977, at C1,

Rights Committee and selecting activist Susan Brown to lead it.<sup>148</sup> In the same year, NOW voted for a Homemakers' Bill of Rights, calling for, among other things, "comprehensive review of current domestic relations laws to challenge and change those laws, statutes, procedures, and codes that deprive homemakers of dignity, security, and recognition."<sup>149</sup>

By contrast, NOW did not give much consideration to which advantages or assets of wage-earning husbands constituted marital-property. The organization's priorities were shaped by the terms of the ERA debate. As we have seen, in order to win the support of homemakers, NOW worked to demonstrate its belief that homemakers' contributions to a marriage were equal to those of wage earners.

The issue of marital-property reform became equally important to most other national women's organizations. At the national Conference for International Women's Year (IWY), a major feminist convention, a Committee on the Homemaker headed by key ERA supporter Representative Martha Griffiths also focused on divorce reform.<sup>150</sup> As had NOW, Griffiths and the Committee called for marital-property reform necessary to "assure that as a minimum the economic protections for dependent spouses and children of the Uniform Marriage and Divorce Act [were] included."<sup>151</sup>

At the same time, new organizations formed to campaign for the ERA and to link it to pro-homemaker divorce reform. Organized on a local basis in 1973, Homemakers for the ERA (HERA) went national in 1978.<sup>152</sup> Within a year, the group had 2,000 members and as many as 15 state chapters.<sup>153</sup> As Anne Follis, the President of HERA, explained, "[w]ithout a constitutional amendment, [homemakers would] continue to be at the mercy of the whim of the courts and the lawmakers."<sup>154</sup> Organizations like HERA tied the ERA to divorce reform and publicized the necessity for certain kinds of marital-property reform. In a 1976 brochure, for example, HERA

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for a discussion of the election of Eleanor Smeal, a homemaker, to the presidency of NOW.

148. See Letter of Appointment for Susan Brown to Head of NOW Homemakers' Rights Comm. (Jan. 5, 1978) (on file with The NOW Papers, MC 496, Box 46, Folder 40, Schlesinger Library, Harvard University).

149. See Homemakers' Bill of Rights, National Organization for Women (1978), available at [http://www.now.org/issues/mothers/bill\\_of\\_rights.html](http://www.now.org/issues/mothers/bill_of_rights.html) (last visited Feb. 24, 2010).

150. See Letter from Martha Griffiths to Jill Ruckelshaus (Jan. 12, 1976) (on file with The Catherine East Papers, Box 19, Folder 2, Schlesinger Library, Harvard University). For further discussion of Griffiths' role working on IWY, see *Wives Rights Said Not Equal*, HARTFORD COURANT, Oct. 31, 1977, at 9.

151. See Griffiths to Ruckelshaus, *supra* note 150 at 1–2.

152. See *Homemakers for ERA Organize*, TUSCALOOSA NEWS, Nov. 2, 1979, at 4.

153. See *id.*

154. See *id.*

argued that the ERA was desirable because of the divorce reforms it would require, including measures recognizing the contributions of homemakers.<sup>155</sup> As the brochure explained, the ERA would “force the law to recognize that a homemaker’s services constitute the homemaker’s contribution to the support of the family” and “would entitle a wife to financial support in compensation for her services as a homemaker.”<sup>156</sup> Other feminist organizations, like the Women’s Equity Action League (WEAL) took up the controversy surrounding homemakers and divorce.<sup>157</sup> In a 1977 pamphlet, citing marital-property and alimony reforms, WEAL argued that the “homemaker wife and mother need[ed] the Equal Rights Amendment more than any other class of woman.”<sup>158</sup>

Between 1975 and 1985, the marital-property debate differed considerably from the conventional account often given for the divorce revolution. The debate was neither technical nor politically obscure; it took place very much in the public eye. Press coverage took two general forms. One involved the ERA and its impact on divorce law; dozens of stories discussed the necessity of pro-homemaker reforms and questioned whether the ERA would mandate them.<sup>159</sup> A second form of coverage focused on the personal costs of existing laws for divorced homemakers.<sup>160</sup> Taken together, both

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155. See Homemakers Equal Rights Ass’n, *Homemakers Need the Equal Rights Amendment* (1976) (on file with The NOW Papers, MC 496, Box 46, Folder 40, Schlesinger Library, Harvard University).

156. See *id.*

157. See Women’s Equity Action League, *The Equal Rights Amendment for Equal Rights Under the Law* (1976) (on file with The WEAL Papers, MC 311, Carton 3, Folder 143, Schlesinger Library, Harvard University).

158. See *id.*

159. See, e.g., Richard Jensen, *Outcome in Doubt*, CHI. TRIB., Apr. 8, 1973, at A3; Judy Klemesrud, *Opponent of ERA Confident of Its Defeat*, N.Y. TIMES, Dec. 15, 1975, at 53; Judy Klemesrud, *For Women, Gains and Losses in ‘75*, N.Y. TIMES, Jan. 2, 1976, at 46.

160. See Nancy Ross, *Housewives and Working Women Shorted*, WASH. POST, Nov. 12, 1978, at L13; Mike Feinsilder, *Testimony Shows Discrimination Against Divorced, Widowed Women*, CHI. TRIB., Sep. 15, 1975, at 12; Harriet Stix, *Task Force On Older Women*, L.A. TIMES, May 27, 1975, at E5, for a sample of the discussion of proposed pro-homemaker legislation debated in Congress during this period. See Judy Klemesrud, *“Obsolete” Divorce Laws Assailed at NOW Conference Here*, N.Y. TIMES, Jan. 21, 1974, at 32, for an example of how the issues of homemakers’ rights and marital-property reform in New York attracted press attention as early as 1974. See Rianne Tennenhaus Eisler, *Inequities Force Women to Face Social Insecurity*, L.A. TIMES, Jul. 22, 1977, at D7; *No-Fault Divorces: Women, Children Hurt?*, CHRISTIAN SCI. MONITOR, Jul. 22, 1976, at 20; Lynne Darling, *The Displaced Woman: Facing the Future*, WASH. POST, Mar. 18, 1976, at MD-1; Colman McCarthy, *Mothers Struggling on Their Own*, WASH. POST, May 9, 1976, at 35, for examples of press coverage of displaced homemakers.

kinds of stories brought considerable public attention to the issue of marital-property reform.

### III. DIVORCE AND THE HOMEMAKER: THREE CASE STUDIES

Thus far, we have seen evidence that the national marital-property debate was very different from the way the no-fault revolution has been described conventionally; in actuality it was divisive, intense, and very public. The debate took place in the shadow of the campaign for the ERA, and discussion of the Amendment shaped the terms of debate and made it more controversial.

But what was the practical impact of the marital-property debate? This section looks closely at marital-property reform in three states: Virginia, Connecticut, and New York. The conventional account—that the divorce revolution was silent—is best tested in states like these, where the ERA debate was particularly intense. As we shall see, discussion in the period was heated in Virginia because the state had not yet ratified the ERA and because Amendment proponents came close to victory in several state legislative votes. Connecticut witnessed intense debate after the state's early ratification of the ERA because activists on either side used developments in the state as evidence of the probable effect of the federal ERA. New York, for its part, was the site of intense debate after the failure of a state ERA. Nationally and within the state, observers saw New York as a bellwether and presented its debate as a representative one.

The divorce revolution is often argued to have been silent because women's groups were too preoccupied with the ERA to become involved in divorce reform. That the women's movement influenced divorce reform in the three states studied here goes to the heart of the problems with conventional historical claims.

The ties between the processes in each state should not be overstated, but several underlying themes emerge. In each state, marital-property reform measures were described as "women's bills," laws intended to benefit homemakers economically and to valorize their contributions. In each state, reform took place only after several false starts and only after considerable controversy. And in each state, marital-property reform was linked to the struggle for the ERA.

#### *A. Virginia*

Virginia first considered marital-property reforms in January 1974, when a state legislative commission recommended changes to the statutes in



place at the time.<sup>161</sup> As its members explained, the measures proposed by the commission were intended to “ameliorate the bitterness and hostility of divorce proceedings.”<sup>162</sup> To the extent that these reforms addressed gender-based discrimination, the commission showed more concern for men than for women. In this vein, the commission recommended laws permitting men to receive alimony, requiring women to share in the responsibility for marriage-license fees, and allowing men as well as women to hold property in their own names immune from inheritance taxes.<sup>163</sup> Moreover, as originally worded the reforms proposed by the commission assigned relatively little importance to gender equality. As one member explained, the main result of the proposed reforms was to make “getting married in Virginia a little harder and getting a divorce a little easier.”<sup>164</sup>

When divorce reforms finally passed in Virginia in 1979, the stated purpose of the law had changed significantly. Ultimately described as the “women’s bill,” marital-property reform was linked to the ERA and strongly promoted by female legislators and women’s groups.<sup>165</sup> Notwithstanding these efforts, the Amendment was rejected in the Virginia House of Representatives in February 1974.<sup>166</sup> After 1974, as we have seen, ERA ratification efforts focused increasingly on the issues of marital-property reform and homemakers’ rights. These efforts made some impact: the Virginia Senate defeated the Amendment by only a very narrow margin in January 1977.<sup>167</sup> Virginia never went on to ratify the ERA.<sup>168</sup>

The ERA struggle ultimately shaped the purpose and terms of divorce reform in Virginia. Mary Sue Terry, a leading proponent of marital-property reform and supporter of the ERA, explained that the bill was intended to address “the concerns of home makers who have been fearful of the controversial Equal Rights Amendment.”<sup>169</sup> Terry described the bill as part of the ERA battle. As she stated, “the same women the opponents of the ERA

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161. Kenneth Bredemeier, *Virginia Council Would Ease Divorce Law*, WALL ST. J., Jan. 16, 1974, at C1.

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* Karlyn Barker, *Delegates Give Big Vote to Marital Property Bill*, WASH. POST, Jun. 26, 1979, at C3.

166. *Equal Rights Amendment Rejected in Virginia House*, N.Y. TIMES, Feb. 28, 1974, at 9.

167. *Virginia Senate Rejects Equal Rights Amendment*, N.Y. TIMES, Jan. 28, 1977, at 10.

168. On the states not to have ratified Equal Rights Amendment, *see* Equal Rights Amendment: Frequently Answered Questions (c. 2009), available at <http://www.equalrightsamendment.org/faq.htm> (last visited February 25, 2010).

169. Barker, *supra* note 165, at C3.

say they want to protect—the homemakers—are the same women this bill speaks to.”<sup>170</sup>

The actual terms of the “women’s bill” were also intended to benefit homemakers. First, the statute abandoned a title-based system of property allocation and recognized the concept of marital property.<sup>171</sup> The statute authorized the equitable division of marital property, and for the first time, permitted trial courts to consider the non-monetary contributions of homemakers.<sup>172</sup> The law also offered a significant, and fairly “pro-homemaker,” definition of marital property, establishing that each party was “to share in the accumulated net worth of the marriage regardless of monetary contributions.”<sup>173</sup>

The bill’s key supporters and opponents also described it, like the ERA, as centrally concerned with gender-equality issues. Representative Gladys Keating described the measure as a “family security bill,” intended to benefit homemakers and their children.<sup>174</sup> Representative Elise Hens echoed this account, stating that the spouse “doing all the home work should not be precluded from owning property.”<sup>175</sup> Even opponents of the legislation agreed that the law primarily addressed sex-based discrimination, contending that current laws were sufficient because existing rules treated female “spouses and their property equally in divorce cases.”<sup>176</sup>

By 1979, partly because of the ERA campaign, marital-property reform was defined as a women’s issue in Virginia. Because of interest-group involvement, divorce reform addressed not only the reduction of in-court acrimony but also the rights of homemakers in divorce.

### B. Connecticut

Unlike in Virginia, women’s groups in Connecticut were heavily involved in the debate from the beginning. In 1971, members of NOW endorsed no-fault laws without focusing heavily on protections for vulnerable dependent spouses.<sup>177</sup> At a winter 1971 presentation to a state legislative committee, members of NOW and WEAL focused on the need in Connecticut for a “no-fault system in which neither spouse needs to be deemed

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170. *Id.*

171. *See id.*

172. *See id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.*

177. Bruce Kaufman, *Women Urge Abolition of Laws That Discriminate*, HARTFORD COURANT, Dec. 17, 1971, at 28.

guilty in court.”<sup>178</sup> In February 1973, Judy Pickering of Connecticut NOW linked the state organization’s support for no-fault to its campaign for the ERA.<sup>179</sup> She asserted that the Amendment would “revamp divorce laws which [ . . . ] discriminate against women.”<sup>180</sup> In Pickering’s view, alimony issues were of only secondary importance and would probably vanish once no-fault laws were enacted.<sup>181</sup> As Pickering told the *Hartford Courant*, “[n]o-fault divorce laws [ . . . ] would eliminate the need for alimony payments.”<sup>182</sup>

Some members of Connecticut NOW, however, already disagreed with Pickering’s approach. In 1973, Spalding wrote the state legislature, urging that they reject a no-fault bill that did not address the organization’s concerns.<sup>183</sup> The state passed no-fault reform that year and, as the Connecticut Supreme Court later stated, the legislative history of the law indicated an intention to account for the value homemakers added to marriage.<sup>184</sup>

The ERA campaign affected the evolution of reform in Connecticut, but did so differently than it had in Virginia. Because Connecticut ratified the federal ERA early on, opponents of the Amendment argued that reforms enacted by the state in anticipation of the ERA’s passage into law illustrated the potential impact of the Amendment.<sup>185</sup> In a well-publicized 1972 paper on the effects of the Amendment on alimony and support rules, Mary Ann Hawco, a member of STOP ERA, focused on the laws passed in ratified

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178. *See id.*

179. *See* Therese Carmel, *Backers Claim Assembly Votes to Pass Rights Amendment*, *HARTFORD COURANT*, Feb. 14, 1973, at 73.

180. *See id.*

181. *See id.*

182. *See id.*

183. *See* Liz Spalding, Model Letter to the Legislature Re: HB 8235 (1973) (on file with The NOW Papers, Mc 496, Box 46, Folder 41, Schlesinger Library, Harvard University).

184. *O’Neill v. O’Neill*, 536 A.2d 978, 983 (Conn. App. 1988) (describing the legislative history supporting this view). On Connecticut’s adoption of no-fault in 1973, see, for example, Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present, and Future*, 1990 WIS. L. REV. 807, 866 (1990). Wenig expresses skepticism about the strength or clarity of the recognition of homemakers’ contributions after *O’Neill*.

185. As Phyllis Segal of the NOW Legal Defense and Education Fund (LDEF) later explained, the reforms passed in states that introduced a state ERA or ratified the federal Amendment “help[ed] to dispel the rampant myths about . . . federal” constitutional change. *See* Press Release, NOW LDEF and the Women’s Law Project Win Grants for the ERA Impact Project (Dec. 27, 1979) (on file with The NOW Papers, MC 496, Box 197, Folder 3, Schlesinger Library, Harvard University).

states.<sup>186</sup> Phyllis Schlafly honed this tactic in 1975, arguing the true impact of the Amendment could be determined by looking at the laws in place in ratified states.<sup>187</sup>

By the mid-1970s, organizations like NOW and Homemakers for ERA realized that the divorce reforms introduced in ratified states like Connecticut played an important role in persuading homemakers to endorse the ERA. NOW's new President Ellie Smeal told the press that the meaning of the federal ERA could be determined by looking at what "actually happened in the 14 states that added a state [or federal] version of the ERA."<sup>188</sup>

Other NOW members reached similar conclusions; for example, NOW leader Gail Falk asserted that "countering [Schlafly]" required "a sensitive combination of education that things [were not] very good now, and [information that,] if anything, things [would] be better rather than worse after ERA."<sup>189</sup>

As a ratified state, Connecticut appeared to offer feminists important evidence of the kind of marital-property reforms that the ERA would require or permit. Partly for this reason, the Connecticut Permanent Commission on the Status of Women began lobbying in 1976 for a number of pro-homemaker laws, including measures calling alimony "spousal maintenance" and requiring a clearer mandate for judicial consideration of the non-monetary contributions of homemakers when equitably dividing marital property.<sup>190</sup> Even after the Connecticut Judiciary Committee resoundingly rejected these proposals, the Commission publicly and vehemently demanded that equitable property division rules explicitly require recognition of homemaker contributions.<sup>191</sup>

Ideas put forth by national NOW and by Liz Spalding in Connecticut shaped the marital-property bill that ultimately passed in 1978. At this time, the measure was still controversial: those on either side invoked the

186. See Mary Ann Hawco, Support for the Equal Rights Amendment (Fall 1972) (on file with The NOW Papers, MC 496, Box 196, Folder 8, Schlesinger Library, Harvard University).

187. See SCHLAFLY REPORT, *supra* note 130 at 3.

188. Who's Lying About the ERA (nd.) (on file with The NOW Papers, Box 138, Folder 12, Schlesinger Library, Harvard, University). On Smeal's election as NOW President, see, for example, Ben Franklin, *A New President for NOW: Ellen Marie Cutri Smeal*, N.Y. TIMES, Apr. 28, 1977, at 18.

189. See Gail Falk to Brenda Feigen Fasteau et al., Strategy Memorandum (Mar. 28, 1973) (on file with The Catherine East Papers, MC 478, Box 22, Folder 47, Schlesinger Library, Harvard University).

190. *Women's Unit Seeks Revision of Divorce Law*, HARTFORD COURANT, Dec. 12, 1976, at 4.

191. *Group to Push For Property Settlement Bill*, HARTFORD COURANT, Mar. 16, 1977, at 16.

ERA, and the vote on the bill was close (for example, in the House, the vote was 124–120 in favor).<sup>192</sup> Opponents told the *Hartford Courant* that homemakers should not have rights unless they demonstrated their value to their husbands.<sup>193</sup> As one legislator explained: “if a homemaker’s value is to be considered, it seems reasonable for a judge to leave the court [. . .] and see how good a job this particular spouse does in everyday homemaker tasks.”<sup>194</sup> By contrast, proponents described marital-property reform as an issue related to the Amendment and the gender-equality issues that it addressed. Ernest Abate, a key supporter of the bill, explained that reform, like the ERA, was necessary because “[c]urrent law [was] written to have the judge consider the husband in a more favorable light.”<sup>195</sup> Ultimately, Connecticut passed a law permitting the equitable division of marital property and ordering judges to consider homemakers’ contributions as a highly salient factor in making that division.<sup>196</sup>

### C. New York

As was the case in Virginia and Connecticut, the controversy surrounding divorce reform in New York was closely tied to the battle for the ERA and its alleged impact on homemakers. In New York, though, the relationship between the Amendment and divorce laws was different. Like Connecticut, New York ratified the federal ERA early on.<sup>197</sup> However, after the spectacular defeat of a state ERA in 1975, both feminists and antifeminists identified New York as a bellwether state.

At the national level, prominent activists agreed with this assessment. Betty Friedan accused the leadership of national NOW of having a “lack of tactical common sense” in addressing the attack mounted by ERA opponents.<sup>198</sup> “While lies were spread by ERA opponents, [. . .] they fed real fears of women,” she said. “We must understand these fears, and if the movement is to continue to grow, to give these women strength.”<sup>199</sup> Martha Weinman Lear, a prominent author and ERA supporter, agreed that the reasons for

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192. See Carol Giacomo, *House Backs Housewives Contributions*, HARTFORD COURANT, Apr. 5, 1978, at 4.

193. See *id.*

194. *Id.*

195. *Id.*

196. See *id.*

197. New York State ratified the Amendment in May 1972. See JANET BOLLS, *THE POLITICS OF THE EQUAL RIGHTS AMENDMENT: CONFLICT AND THE DECISION PROCESS 2* (1979).

198. Joan Zyda, *Internal Struggle Jeopardizes NOW*, CHI. TRIB., Nov. 20, 1975, at B3.

199. Enid Nemy, *Feminists Reappraise Direction and Image*, N.Y. TIMES, Nov. 8, 1975, at 1.

the defeat of the New York state ERA could be generalized nationally.<sup>200</sup> As Lear put it, “[b]y focusing on the law, which is far removed from its application, opponents of ERA were able to scare the hell out of homemakers, conjuring up for them visions of being thrust into a cold world which they had never been trained to conquer.”<sup>201</sup>

When Massachusetts was considering its own state amendment, Jacqueline Basha, a leading member of the pro-ERA coalition in the state, agreed that most opposition to the Amendment came from homemakers and other “women who [felt] genuinely threatened by changes in society.”<sup>202</sup> Similarly, New York activists agreed with Basha that pro-homemaker divorce reforms were an important part of the strategy to ratify the ERA. As Basha explained, it was only in this way that ERA proponents could show that “the people who [. . .] benefited most were homemakers.”<sup>203</sup> For example, at an IWY event in Albany, one important issue was homemakers’ rights in divorce, and the best-attended workshops involved homemakers’ concerns.<sup>204</sup>

Women’s groups had an impact on property-reform proposals in New York in 1976, when the Legislature first considered a bill addressing the issue. Shaped by ERA proponents, the bill was advertised as a homemakers’ “equity” bill.<sup>205</sup> The proposed measure finally disposed of a system based on legal title, instead requiring the equitable distribution of marital property and permitting judges to consider homemakers’ non-monetary contributions in dividing property.<sup>206</sup> Opposition to the measure focused on the harms produced by divorce itself rather than on any gender-equality argument.<sup>207</sup> As the *New York Times* reported in June 1976, the constituency “violently opposed to divorce” “would interpret any attempt to change the laws as tantamount to favoring divorce itself.”<sup>208</sup> Because of the strength of this opposition, the bill was defeated in legislative committee by a vote of 10–5.<sup>209</sup>

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200. See Martha Weinman Lear, *Women’s Latent Fears Imperil Rights Drive*, L.A. TIMES, Apr. 18, 1976, at E1.

201. *Id.*

202. John Kifner, *Statewide ERA Faces Key Test in Massachusetts*, N.Y. TIMES, Nov. 1, 1976, at 79.

203. *Id.*

204. See Nan Robertson, *Women’s Meeting Friday in Albany Will Have a National Focus*, N.Y. TIMES, July 5, 1977, at 39.

205. See Ronald Smothers, *Fiscal “Equity” in Divorce Dies in Albany*, N.Y. TIMES, July 3, 1976, at 1, 32.

206. See *id.* at 1.

207. See *id.* at 32.

208. *Id.*

209. See *id.* at 1.

Between 1976 and 1980, when New York finally passed marital-property reform, feminists' involvement with homemakers' rights changed significantly. As we have seen, before 1975, national NOW was led by feminist attorneys and activists like Karen DeCrow and Arlie Scott who were relatively uninterested in family law or homemakers' rights issues. At the time, NOW focused to a greater extent on the rights of working women, as well as on preventing date rape and other forms of sexual violence.<sup>210</sup> Partly out of dissatisfaction with this course of action, thirteen activists broke away from NOW, protesting the supposed failure of the women's movement, as Friedan put it, to move "out of the revolution and into the mainstream."<sup>211</sup> The thirteen activists, Friedan among them, argued that the women's movement had failed to focus on the mainstream issues of "marriage and divorce, older women, [and] homemakers."<sup>212</sup> As Shelley Fernandez, one of the thirteen, explained: "What we are saying is that [homemakers] are vital, they are coming into the movement, and they are bringing up our children, and rhetoric would have them put down."<sup>213</sup>

Between 1976 and 1980, the national discussion of homemakers' rights also changed significantly. NOW's public image changed when DeCrow, an attorney, was replaced as NOW President by Eleanor Smeal, a homemaker.<sup>214</sup> In debating rights on homemakers' access to pensions, Social Security, and post-divorce training, Congress made homemakers' concerns after divorce more public and legitimate.<sup>215</sup> By 1980, dissident groups no longer distinguished themselves by focusing on homemakers' rights. Instead, as the New York debate reflected, disagreements were about how best to protect those rights.<sup>216</sup>

In 1980, women's organizations campaigned heavily in New York for a bill recognizing the value of divorced homemakers' contributions to marriages.<sup>217</sup> As Ernest Burrows, a key sponsor of equitable-distribution legislation, explained, reform would show that marriage should "be a partnership that definitely includes economic equality."<sup>218</sup> The law would replace the widely despised title-based system with one based on the exercise of discre-

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210. On NOW's focus in the early-middle 1970s, see, for example, Joan Zyda, *Internal Struggle Jeopardizes NOW*, CHI. TRIB., Nov. 20, 1975, at B3; Enid Nemy, *13 NOW Leaders Form a Dissident "Network,"* N.Y. TIMES, Nov. 15, 1975, at 57.

211. Nemy, *supra* note 210, at 57.

212. *Id.*

213. *Id.*

214. See Mason, *supra* note 147, at C1.

215. See *supra* notes 144, 145 and text accompanying.

216. For a discussion of this debate, see, for example, Jeanne Clare Feron, *Albany's Seven-Year Itch: Changes in Divorce*, N.Y. TIMES, Jan. 13, 1980, at WC1.

217. See *id.*

218. *Id.*

tion and the equitable division of property.<sup>219</sup> The Burrows Bill would also redefine alimony as maintenance, compensation for “a woman’s role as a homemaker, or for either party’s contribution to the career of the other.”<sup>220</sup>

To the extent that there were disagreements about the Burrows Bill, arguments addressed how, not whether, to best recognize homemakers’ contributions.<sup>221</sup> Linda Winikow of the Senate Minority Task Force sponsored an amendment requiring equal, not equitable, distribution of marital property for this reason.<sup>222</sup> Winikow justified the amendment by stating that the law should “give equal value to the homemaker’s contribution.”<sup>223</sup>

Although New York NOW opposed the Burrows Bill (which was ultimately passed in June 1980), the measure reflected many of the concrete policy proposals advocated by national NOW and other ERA proponents.<sup>224</sup> The law rejected a title-based system of allocation, required consideration of homemaker contributions in the division of marital property, and stated that “modern marriage should be viewed as a partnership of co-equals.”<sup>225</sup>

As we have seen, organizations like national NOW and Homemakers for ERA had promoted these reforms as part of an attempt to shore up support for the Amendment and to beat back opposition of the kind that defeated the state ERA. Although those working to help homemakers did not agree on the best direction for marital-property reform, these divisions did not prevent the women’s movement from having an impact. The New York bill was still unmistakably a women’s bill – a reflection of ideas advanced as part of the ERA campaign.

#### IV. NORMATIVE IMPLICATIONS

Leading studies suggest two problems created by the history which shaped modern marital-property rules of the kind introduced in Virginia, Connecticut, and New York. Martha Minow and Deborah Rhode, for example, argue that divorce reformers did not really consider the impact of the

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219. See Lawrence Van Gelder, *Albany Moves Toward Divorce-Law Change*, N.Y. TIMES, Mar. 12, 1979, at B13.

220. Feron, *supra* note 216, at WC1.

221. *See id.*

222. *See id.*

223. *Id.*

224. See Robin Herman, *Major Changes in Divorce Law Voted in Albany*, N.Y. TIMES, Jun. 4, 1980, at A1. Like Winikow, New York NOW argued that equal property division was necessary to prevent family law judges from discriminating against women. See also Feron, *supra* note 216, at WC1.

225. See Herman, *supra* note 224.



new rules on women.<sup>226</sup> This account echoes standard arguments about the introduction of no-fault rules: because feminists had little influence in the no-fault revolution, new laws did not reflect women's concerns or needs.<sup>227</sup> By contrast, Martha Fineman has asserted that feminists did play a part in shaping marital-property rules.<sup>228</sup> Fineman argues that feminist reformers embraced a legal vision based almost entirely on formal equality: so long as property was divided equally, women would be treated fairly.<sup>229</sup> Fineman has been highly critical of this formal-equality approach, contending that, instead, "result equality should have been the objective of [marital-property] reforms."<sup>230</sup>

The history considered here offers a different perspective on the influence of 1970s reformers on contemporary divorce law. Because of the ERA battle, as we have seen, feminists found themselves struggling to convince homemakers that the Amendment was in their own best interests. In order to win the support of these homemakers, feminists pushed divorce reforms that recognized and valued the contributions of non-wage-earning spouses. By contrast, feminists paid relatively little attention to which contributions of the earning spouse should count as marital property.

In the years to come, this omission would prove costly. With few exceptions, since at least the late 1990s, courts have refused to treat the value of degrees or other forms of enhanced earning power as marital property.<sup>231</sup> Some attribute these past decisions to the courts' perception that degrees or other forms of enhanced earning power are the product of the individual talents and hard work of the earning spouse.<sup>232</sup> Other scholars point to the courts' apparent belief that supporting spouses make a less meaningful contribution to the acquisition of education or enhanced earning power than do those who directly acquire greater human capital.<sup>233</sup> Some courts may also be systematically devaluing noneconomic contributions, at least in the context of intangible human capital.<sup>234</sup>

While there are many reasons that courts have not deemed human capital to be marital property, the most crucial is that equitable-property

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226. Minow & Rhode, *supra* note 3, at 191, 195.

227. FINEMAN, *supra* note 11, at 4, 29.

228. *Id.*

229. *Id.*

230. *Id.*

231. See *supra* note 13 and text accompanying. For examples of post-2001 decisions in this vein, see, for example, *Gaskill v. Robbins*, 282 S.W.3d 306, 311 (Ky. 2009); *Clemons v. Clemons*, 960 So.2d 1068, 1074 (La. App. 2d Cir. 2007); *Sullivan v. Sullivan*, 159 S.W.3d 529, 539 (Mo. Ct. App. 2005).

232. Kelly, *supra* note 13, at 102–03, 108, 121.

233. *Id.* at 102–03.

234. *Id.* at 107–13.

division statutes do not make clear that it should be considered marital property. Courts seem to be relatively attuned to clear statutory instructions on the subject of property division. As Suzanne Reynolds has shown, following statutory commands that define and order the equitable division of marital property, courts divide marital property relatively equally.<sup>235</sup> But whereas many state property statutes explicitly recognize that a homemaker's contributions should be a factor in the allocation of marital property, state laws give little guidance as to how courts should analyze human capital.<sup>236</sup> This omission partly reflects the terms of the debate that produced marital-property reform in the 1970s. By focusing on the equal treatment of wage earners and homemakers, reformers pushed laws that recognized the value of homemakers' contributions but did not consider which contributions of wage earners should count as marital property.

What should be done to address this oversight? Feminists interested in ensuring equal outcomes, rather than formally equal treatment, should at least consider completing the marital-property revolution begun in the 1970s. Statutes should spell out that human capital is a form of marital property and value the contributions of women, both homemakers and wage earners, to it.

#### CONCLUSION

According to many, the divorce reformers of the 1970s and early 1980s got a considerable amount wrong. These reformers are argued to have focused on reducing the acrimony and fraud that characterized the fault system, paying little attention to the impact of divorce reform on women or homemakers. According to many accounts, this oversight was part of what made divorce reform disastrous for many women.

Although modern critics offer various reform proposals to address homemakers' concerns, many depend on a shared historical account of the divorce revolution focused on the introduction of no-fault rules. The divorce revolution is seen to have been a mostly silent one. We can identify several premises of the conventional narrative: 1) a claim that women's organizations were too preoccupied with the ERA to concern themselves with divorce reform; 2) a contention that the primary proponents of divorce reform presented it as an uncontroversial modification of existing rules; and 3) an argument that marital-property reforms were too technical and detailed to be widely discussed by anyone but legal experts.

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235. Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 *FORDHAM L. REV.* 827, 866-71 (1988).

236. Kelly, *supra* note 13, at n.50.

However, by paying greater attention to the evolution of marital-property rules, this Article offers a different account, one that brings together important work on divorce law and on the history of the ERA. Viewed through this lens, the marital-property revolution was one led by and for women. The ERA made feminists and their opponents more, rather than less, interested in marital-property reform. Between 1972 and 1975, in fighting against the Amendment, groups like HOW, STOP ERA, and the Anti-Women's Liberation League focused on marital-property reform in criticizing the alleged effects of the Amendment. In order to refute these claims, national NOW began discussing and promoting pro-homemaker divorce reforms. In states like Virginia, Connecticut, and New York, these debates left their mark on the property reforms that were ultimately adopted.

The stakes of more fully understanding the history of the divorce revolution are high. This Article offers the first in-depth history of the movement for marital-property reform, a struggle with distinctive participants, stakes, and terms. The Article also offers new perspective on the legacy of the divorce revolution of the 1970s. Partly because of the demands of the ERA debate, feminists promoted pro-homemaker divorce reforms designed to shore up the support of "traditional" women for the Amendment. Because of this focus, feminists advanced reforms that reflected what homemakers, rather than their husbands, contributed to marriage. In the process, feminists did not adequately address what should count as marital property, especially in the context of the human capital of the wage-earning husband.

From a history of divorce reform, we can see the promise and constraints of the arguments advanced for greater gender equality in the division of marital property. We can see, too, that contrary to what some have implied, the marital-property revolution was neither silent nor complete. ♣