Choice at Work: Employment Discrimination and the Lost Potential of Choice

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The decision of *Roe v. Wade*[1] seems to have saddled feminists with a limited and limiting rhetoric of reproductive choice.[2] By focusing on privacy, the Court ignored the importance of a state-created safety net for poor and non-white women.[3] Choice rhetoric justified class and race divisions in access to reproductive healthcare, reinforcing assumptions that some women could not responsibly exercise reproductive autonomy.[4]

By spotlighting an understudied debate about reproductive liberty at work, this paper explores the lost potential of arguments for reproductive choice. Immediately before and after the decision of *Roe v. Wade*, feminists developed a principle of meaningful reproductive choice. At a minimum, litigators demanded that state actors not place special burdens on women who made

[1] 410 U.S. 113 (1973).
[2] For a sample of feminist criticism of *Roe*, *see, e.g.*, Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 **AM. U. L. REV.** 77, 85-86 (1995) ("Under *Roe*, the physician [...] is constitutionally required to lead the decision-making process."); Scott Moss, *The Intriguing Federalist Future of Reproductive Rights*, 88 **B.U. L. REV.** 175, 178 (2008) (describing *Roe*'s "doctor-focused"—rather than woman-focused—justification); Catharine A. MacKinnon, ABORTION: ON PUBLIC AND PRIVATE, IN TOWARD A FEMINIST THEORY OF THE STATE 184 (1989); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 **YALE L.J.** 1394, 1394-1404 (2009).
[3] *See, e.g.*, Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 **BERKELEY J. AFR.-AM. L. & POL'Y** 71, 81 (2012) ("The choice to hold fast to *Roe*, particularly to its emphasis on reproductive rights and privacy, alienated many poor women and women of color").
[4] *See, e.g.*, RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 4-6 (2001).

one reproductive decision or another. More ambitiously, some feminists suggested that the State may have to act to affirmatively support some fundamental rights.

A line of Supreme Court decisions completely rejected this understanding of reproductive liberty.[5] However, choice arguments rejected in the juridical arena flourished in Congress. For a variety of strategic and ideological reasons, feminists and antiabortion activists turned to legislative constitutionalism to give meaning to the idea of reproductive liberty. Feminists used antidiscrimination statutes to express important ideas about the relationship between equality and liberty: without protections against workplace discrimination, women could not truly exercise reproductive choice. For some pro-lifers, ensuring meaningful choice would reduce the abortion rate and guarantee protections desperately needed by mothers denied equal treatment at work.

In passing the Pregnancy Discrimination Act (PDA) of 1978, Congress helped to elaborate on the idea of reproductive liberty. While not requiring employers to provide any accommodations, the PDA prohibited employers from placing special burdens on women's procreative decisions. The story of the PDA makes apparent the transformative potential of choice arguments widely derided by academic commentators.

The remainder of the paper proceeds in three parts. First, the paper chronicles the successful legislative constitutional project pursued by the proponents of the PDA. Next, the paper examines the reasons for the decline of meaningful choice arguments in the early 1980s. Finally, the paper concludes by posing some of the questions this account may raise for the history and future of the women's movement.

[5] *See, e.g., Geduldig v. Aiello*, 417 U.S. 484 (1974) (rejecting an equal-protection challenge to the exclusion of pregnancy in California state disability policy); *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (rejecting a challenge to a pregnancy exclusion under Title VII of the Civil Rights Act of 1964); *Maher v. Roe*, 432 U.S. 464 (1977) (rejecting a constitutional challenge to state ban on publicly funded abortions); *Harris v. McRae*, 448 U.S. 297 (rejecting a constitutional challenge to a federal ban on publicly funded abortions).

In the late 1960s and early 1970s, to an unprecedented extent, the welfare rights movement challenged the constitutional distinction between a right and a privilege.[6] In *Griswold v. Connecticut*[7] and *Eisenstadt v. Baird*,[8] the Supreme Court had suggested that the Constitution offered some protection for crucial decisions involving reproduction.[9] By turning to poverty law, some feminists asked whether reproductive liberty was among the "rights […] so fundamental that the state must provide […] the means to exercise them."[10]

These arguments figured centrally in the litigation of discriminatory leave policies affecting public school teachers and Air Force service personnel, including *Struck v. Secretary of Defense*,[11] a case famously litigated by ACLU attorney Ruth Bader Ginsburg.[12] Similarly in *Cleveland Board of Education v. LaFleur*,[13] Jane Picker and her colleagues challenged a maternity leave policy requiring school teachers to take eight months of leave

[6] *See generally* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 **HARV. L. REV.** 1439, 1445-46 (1968); Frank I. Michelman, *The Supreme Court, 1968 Term-Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 **HARV. L. REV.** 7, 9-11 (1969). For further discussion of the history of the welfare rights movement, *see, e.g., generally* FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007); PREMILLA NEDASAN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES (2005); MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1995). On the history of welfare rights litigation in the Supreme Court, *see, e.g.*, ELIZABETH BUSSIERE, (DIS-)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).

[7] 381 U.S. 479 (1965).

[8] 405 U.S. 438 (1972).

[9] On the state of the privacy right in the aftermath of *Eisenstadt*, *see, e.g.*, DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 473-600 (1994).

[10] Brief as Amici Curiae for the American Public Health Association et al. at *11-12, *Maher v. Roe*, 432 U.S. 464 (No. 75-1440).

[11] *Struck v. Sec'y of Defense*, 460 F.2d 1372 (9thh Cir. 1971). The Supreme Court would ultimately dismiss Struck's appeal as moot. *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972).

[12] On the history and importance of the *Struck* litigation, *see, e.g., generally* Reva B. Siegel and Neil S. Siegel, Struck *By Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 **DUKE L.J.** 771 (2010).

[13] *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632 (1974).

without pay,[14] arguing that the waiting period burdened "women's fundamental right to bear children."[15]

However, by 1978, the Supreme Court had rejected the understanding of reproductive liberty that feminists had advanced. In 1974, *Geduldig v. Aiello* held that the exclusion of pregnancy from California's disability policy did not discriminate on the basis of sex, since there was "no risk for which men [were] protected and women [were] not."[16] While *Geduldig* ignored the issue of unconstitutional conditions, *Maher v. Roe*, a case involving the constitutionality of bans on the public funding of abortion, suggested that the doctrine had no place in the jurisprudence of reproductive liberty. The *Maher* Court concluded that the Constitution protected only a right to make certain reproductive decisions free from government compulsion.[17] By conditioning the receipt of support on a woman's surrender of her abortion right, Connecticut had placed "no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[18]

However, these decisions did not mark the end of arguments for meaningful reproductive liberty; far from it. After 1976, in *General Electric Company v. Gilbert*, when the Court rejected arguments that Title VII of the Civil Rights Act of 1964 prohibited pregnancy discrimination, those on opposing sides of the abortion issue turned to Congress to revive the constitutional arguments for meaningful reproductive choice rejected by the Court.[19]

Antiabortion activists turned to this idea of reproductive liberty as part of an effort to ground protections for the fetus in existing constitutional doctrine. Working in emerging national

[14] *See* Brief for the Respondents at *43-44, *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632 (1974) (Nos. 72-777; 72-1129).
[15] *Id.*
[16] *Geduldig*, 417 U.S. at 496-497.
[17] *See Maher*, 432 U.S. at 474.
[18] *Id.* at 475.
[19] *See General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

groups like the National Right to Life Committee (NRLC) and Americans United for Life (AUL), pro-lifers forged an argument based on the overlap of liberty and equality norms, training their fire on laws that denied "the least and most disadvantaged" the implicit right to life.

Activists like Robert Byrn, a law professor and advocate in New York State, presented dependency as a classic suspect classification: abortion represented precisely the kind of invidious discrimination the Equal Protection Clause was designed to root out.[20] In particular, Byrn compared unborn children to illegitimate children, a group afforded some protection by the Supreme Court in the late 1960s.[21] The traits that differentiated the unborn child from other Americans—vulnerability and dependency—made no constitutional difference. Indeed, the dependent required additional constitutional and other legal protections. Highlighting President Lyndon Johnson's War on Poverty, Byrn insisted: "the more helpless and dependent a person is, the more solicitous the law is of his welfare."[22]

While claiming that vulnerability-and-dependency fit within a conventional equal protection framework, pro-lifers like Byrn in fact demanded a bold reconceptualization of the doctrine centered on the ideas of political powerlessness and individual helplessness. Conventional equal-protection doctrine focused on whether vulnerable individuals had an immutable trait, like race or gender.[23] Activists like Byrn implicitly conceded that unborn children had no such trait. Indeed, pro-lifers presented abortion as discriminatory precisely because it deprived fetuses of life notwithstanding the fact that they resembled other rights-

[20] *See, e.g.*, Robert Byrn, *De-Mythologizing Abortion Reform*, 14 **CATH. LAWYER** 180, 183 (1968). For further examples of pro-lifers' reliance on the Equal Protection Clause, *see, e.g.*, David Louisell, *The Practice of Medicine and the Due Process of Law*, 16 **U.C.L.A. L. REV.** 233, 234 (1968-69).
[21] *See* Byrn, *supra* note 20 at 183.
[22] Robert M. Byrn, *Abortion in Perspective*, 5 **DUQ. U. L. REV.** 125, 127-134 (1966-67).
[23] *See, e.g.*, Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 **YALE L.J.** 485, 496 (1998) (describing the Court's former requirement that, in order to be considered a suspect class, a group must have "obvious, immutable, or distinguishing characteristic[s]").

holders in every constitutionally salient way.[24] Strategically, this move allowed antiabortion activists to respond to claims that fetuses did not count as legal persons under the Fourteenth Amendment.[25] At the same time, by stressing the similarities between fetuses and other persons, antiabortion activists like Byrn expressed deeply held beliefs that abortion would lead the nation down a slippery slope to euthanasia and discrimination against the disabled.

In the aftermath of the *Roe* decision, antiabortion activists worked harder than ever to revolutionize equal-protection jurisprudence, pushing powerlessness and helplessness as the center of constitutional analysis. Increasingly, however, antiabortion activists hotly contested who counted as helpless, vulnerable, and deserving of constitutional protection. Some movement members focused exclusively on the abortion issue, while others also mobilized to battle living-will and death-with-dignity laws.[26] Still others viewed pregnant women, and perhaps all women, as vulnerable, dependent, and deserving of protection. These activists expressed themselves in the conventional rhetoric of the pro-life movement, demanding a reworking of equal-protection doctrine. However, in practice, these advocates moved toward a radical reconceptualization of the movement's goals, one centered partly on women's rights.

During the battle for an Article V amendment recognizing fetal rights, members of American Citizens Concerned for Life (ACCL), a moderate and influential antiabortion organization, began to develop an argument that combined antidiscrimination and reproductive

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[24] *See, e.g.*, Louisell, *supra* note 20 at 234 ("[m]edical evidence would indicate that the various stages of development [were] merely labels which have been placed on what is in fact the steady, constant growth of the human being").

[25] *See, e.g.*, Brief as Amici Curiae of Certain Obstetricians and Gynecologists at *26-27, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) ("when one views the present state of medical science, we find that the artificial distinction between born and unborn has vanished"); Brief as Amicus Curiae for Women for the Unborn at *9, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40) ("[m]odern genetics has confirmed scientifically what women have long felt intuitively—the presence of another human life, a life to be reverenced and protected").

[26] On the diversity of motives and tactics characterizing pro-life activism in the period, *see, e.g*, ZIAD MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOBILIZATION WORKS 192 (2012); CAROL J. C. MAXWELL, PRO-LIFE ACTIVISTS IN AMERICA: MEANING, MOTIVATION, AND DIRECT ACTION 2, 8, 21 (2002).

liberty reasoning. [27] Marjory Mecklenburg of the ACCL testified that pregnant women represented a key example of the vulnerable persons currently denied the protection of the Constitution. Pregnant women were vulnerable partly because the State denied them meaningful reproductive choice. "It is sad indeed," she testified, "that women are making choices about whether to give their children the right to life based on economic conditions. If they feel pressured because of an economic situation, we can ask what kind of choice they really have."[28]

Mecklenburg lobbied for a number of laws designed to guarantee meaningful reproductive choice for pregnant women and new mothers: amendments to the Social Security Act allowing pregnant women to claim unborn children as dependents, "federal and individual state legislation […] providing that pregnancy, parenthood, or marital status cannot constitute grounds for denial of education," and social-welfare programs designed to help indigent, adolescent mothers.[29] Guaranteeing adolescent mothers meaningful reproductive choice would, in Mecklenburg's view, reduce abortion rates, since the mother of a fetus was "the first line of defense against pre-birth aggression."[30] But Mecklenburg went further, endorsing her own understanding of constitutional choice:

> [M]any poor women, pressed by financial circumstances, presently have only the "freedom" to abort [….] Alternatives to abortion must be real if freedom of conscience and responsibility are to be more than rhetoric. This means that society must offer good health care, both pre- and post-natal, daycare facilities, […] and maternity and paternity leave.[31]

While disagreeing strongly with both Mecklenburg's vision of motherhood and position on abortion, feminists ultimately embraced a similar idea of reproductive liberty. Feminists like

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[27] *See* Abortion Part IV: Testimony Before the Senate Judiciary Subcommittee on Constitutional Amendments, 94th Cong. 1st Sess. (Jun. 1975) 643-95 (Statement of Marjory Mecklenburg).
[28] *Id.* at 648-49.
[29] *See, e.g., id.* at 643-95.
[30] The School Age Mother and Child Act of 1975: Testimony Before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare, 94th Cong. 1st Sess. (Feb. 1975) 510 (Statement of Marjory Mecklenburg).
[31] *Id.* at 498.

Wendy Williams and Lettie Cottin-Pogrebin relied on reproductive-choice reasoning in countering claims that the PDA required expensive and unfair special treatment. In testifying in favor of the PDA, Williams spotlighted what she called "[a] necessary side effect" of pregnancy discrimination: "the burden placed on the woman's choice to bear a child."[32] Pogrebin articulated the connection between pregnancy discrimination and reproductive choice more forcefully:

> Pregnancy discrimination forces us to choose between brain and uterus, between making money and making babies, between being productive and reproductive. It is a false dilemma. Men do not have to make this choice; they can be both parents and workers without suffering a social, personal, or economic penalty.[33]

This understanding of meaningful reproductive choice made an impact on the larger society. A variety of religious organizations, including the progressive National Council of Churches, endorsed a more robust concept of a right to choose, asserting:

> Alternatives to abortion must be real if freedom of conscience and responsibility are to be more than rhetoric. This means that society must offer good health care, both pre- and post-natal, daycare facilities, […] and paternity and maternity leave.[34]

Key sponsors of the PDA across the ideological spectrum also echoed this idea of reproductive choice.[35]

Why did meaningful reproductive choice arguments fade from view in the aftermath of the PDA battle? Choice arguments lost influence in the abortion debate not because of any of the flaws later identified by feminist commentators but rather because of a rapidly changing political

[32] Discrimination on the Basis of Pregnancy, 1977: Testimony Before the Subcommittee on Labor of the Committee on Human Resources, 95 Cong 1st Sess. (1977) 137 (Statement of Wendy Williams).
[33] Discrimination on the Basis of Pregnancy, 1977: Testimony Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong. 1st Sess. (1977) 481-82 (Statement of Lettie Cottin Pogrebin).
[34] Statement of Marjory Mecklenburg, *supra* note 30 at 501.
[35] *See, e.g.*, Legislative History of the Pregnancy Discrimination Act of 1978, Senate Committee on Labor and Public Resources, 96th Cong. 2d Sess. (1980) 21 (Statement of Thomas Eagleton); *See id.* at 208-209 (Statement of Ronald Sarasin); *Id.* at 185 (Statement of Paul Tsongas, Massachusetts).

reality. First, pro-life arguments for meaningful choice came into growing tension with the campaign to preserve bans on abortion funding. Henry Hyde and his allies insisted that bans on funded abortion did not violate the constitutional right of reproductive choice because poor women had no right to government assistance of any kind. While admitting that he would ban all abortions if he could, Hyde emphasized that the right to choose recognized in *Roe* in no way required the State to pay for abortion.[36] In the Supreme Court, attorneys representing the Americans United for Life Legal Defense and Education Fund similarly explained: "If the abortion decision is so private […] it follows that government shall not itself be compelled to respond to the demand of the exercise of that right."[37]

By 1978, the year Congress passed the PDA, the war over funding bans had intensified. Congress passed the Hyde Amendment in 1976, and in 1977, the Supreme Court upheld several similar state laws.[38] Almost as soon as it passed, the Hyde Amendment sparked intense conflict about exceptions for rape, incest, and health.[39] Locked in a constant struggle to preserve funding bans, pro-lifers like Marjory Mecklenburg retreated from their earlier positions on meaningful choice.

Moreover, political party realignment, together with the mobilization of the New Right and the Religious Right, made arguments for meaningful reproductive choice seem increasingly out of place in the agenda of the pro-life movement. The recently mobilized New Right and

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[36] CAROL EMMENS, THE ABORTION CONTROVERSY 68-69 (1987).
[37] Brief as Amicus Curiae for Americans United for Life at *8-10, *Poelker v. Doe*, 432 U.S. 519 (1977) (No. 75-442).
[38] For the Supreme Court's decisions on the public funding of abortion: *Maher v. Roe*, 432 U.S. 464, 470–78 (1977) (upholding a Connecticut Medicaid funding ban on abortion); *Poelker v. Doe*, 432 U.S. 419, 420–21 (1977) (sustaining a ban on the use of St. Louis public hospitals for abortion); *Beal v. Doe*, 432 U.S. 438, 445–54 (1977) (upholding a Pennsylvania law that limited Medicaid funding for abortions).
[39] *See, e.g.*, Karen DeWitt, *Foes of Abortion Seek to Tighten Restrictions on Medicaid Funds*, **N.Y. TIMES**, Mar. 1, 1979, at B20; Martin Tolchin, *Financing and Abortion: Both Sides Emphasize Questions of Conscience*, **N.Y. TIMES**, Oct. 2, 1980, at A19; Martin Tolchin, *But Now There Is Pressure of Time and Money to Reach Agreement*, **N.Y. TIMES**, Nov. 27, 1977, at 176.

Religious Right represented a potent new source of allies and political influence for pro-life leaders.[40] Organizations like the Moral Majority and Christian Voice provided much needed financial support and political connections for a struggling pro-life movement.[41] By backing Ronald Reagan and other Republican candidates who endorsed antiabortion positions, pro-lifers bid for unprecedented political influence.[42]

Meaningful-choice arguments no longer fit in the new agenda crafted by the antiabortion movement and its allies. Reagan's presidential campaign had popularized neoliberalism, a theory highlighting the merits of deregulation, welfare cuts, and free markets.[43] Whereas pro-lifers had long demanded equal treatment for all dependent Americans, Reagan described dependency as dangerous. Reagan's Justice Department also scaled back on antidiscrimination protections, particularly when those policies required affirmative action.[44] Ideologically, Administration officials developed a stinging criticism of "special treatment."[45] The pro-life movement's allies in the New Right and Religious Right strongly opposed affirmative action.[46] When the antiabortion movement partnered with the political right, prior commitments to the expansion of antidiscrimination law seemed profoundly out of step.

As pro-lifers moved away from support for meaningful reproductive choice, attacks on legal abortion encouraged feminists to develop new arguments for abortion rights, including

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[40] *See, e.g.*, *generally* Mary Ziegler, *The Possibility of Compromise: Anti-Abortion Moderates After* Roe v. Wade, 87 **CHI.-KENT L. REV.** 571 (2012).

[41] On the emerging alliance between the New Right and Religious Right, *see, e.g.*, Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade: *New Questions About Backlash*, 120 **YALE L.J.** 2028, 2060-65 (2011); DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 165–74 (2012) ("As New Right political operatives looked for controversial issues to highlight their campaigns against congressional liberals, they turned with increasing frequency to the subject of abortion").

[42] On the importance of Reagan and Republican support to pro-lifers in the period, *see, e.g.*, DONALD CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 148-97 (2001).

[43] *See, e.g.*, DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 4-7 (2012).

[44] On the Reagan Administration's opposition to affirmative action, *see, e.g.*, TERRY ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 135-57 (2004).

[45] *See, e.g.*, *id.* at 184.

[46] *See, e.g.*, JEROME HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM 83 (1992); LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974-1980 189, 191-92 (2010).

claims relying on the Equal Protection Clause of the Fourteenth Amendment. Starting in 1973, legal academics from across the ideological spectrum had attacked the constitutional underpinnings of the *Roe* decision.[47] By the early 1980s, academic attacks on *Roe* prompted a powerful response from feminists committed to abortion rights. Commentators from Ruth Bader Ginsburg to Catherine MacKinnon argued that the problem with *Roe* lay not in its recognition of abortion rights but rather in the rationale offered for those rights.[48] As feminists worked to develop a better explanation for abortion rights, the transformative uses of choice that appeared in the 1970s faded from view.

What lessons might this history have for our understanding of the past and future of the women's liberation movement? First, placing the PDA in a broader historical context spotlights the shortcomings of current judicial interpretations of the law. Women have fared poorly when seeking light-duty work or some other modification that would allow them to work throughout pregnancy.[49] As Joanna Grossman has argued, "[t]he failure of current law to acknowledge a pregnant woman's right to work despite temporary, partial impairments or risks systematically

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[47] *See, e.g.*, Jack M. Balkin, Roe v. Wade: *An Engine of Controversy*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE THE AMERICA'S MOST CONTROVERSIAL DECISION 21 (Jack M. Balkin ed., 2005).

[48] *See, e.g.*, Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 **N.Y.U. L. REV.** 1185, 1208 (1992) ("halted a political process that was moving in a reform direction and thereby […] prolonged divisiveness and deferred stable settlement of the issue"); Catharine MacKinnon, Roe v. Wade*: A Study in Male Ideology*, *in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 52–53 (J. L. Garfield & Patricia Hennessey eds., 1984) (criticizing *Roe*'s emphasis on choice and privacy instead of equality); John H. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 **YALE L.J.** 920, 930 (1973) (arguing that outlawing abortion is not about "governmental snooping" into citizens' private lives); Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 **HARV. C.R.-C.L. L. REV.** 329, 331, 371, 373 (2010); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 **N.C. L. REV.** 375, 386 (1985) ("Overall, the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective . . . ."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 **U. PA. L. REV.** 955, 1020 (1984) ("The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is women who are oppressed when abortion is denied. . . . The rhetoric of privacy also reinforces a public/private dichotomy that is at the heart of the structures that perpetuate the powerlessness of women.").

[49] *See, e.g.*, Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 **GEO. L.J.** 567, 614-15 (2010) ("A pregnant woman who seeks to continue working through pregnancy, but experiences a temporary diminishment or alteration of capacity due to the physical effects of pregnancy, will encounter limited protection in the law").

undermines the ability of women to attain workplace equality."[50] As the history of struggles for meaningful choice makes apparent, that same failure undermines the idea of reproductive liberty written into the PDA.

This history also reveals the potential of arguments for reproductive choice. The apparent limits of a "right to choose" stem not from its ideological underpinnings but rather from a contingent and fluid set of political circumstances. Just the same, the history of choice at work offers reason for caution as well as hope. Choice arguments created a limited form of common ground for women who disagreed passionately about abortion. These arguments allowed politicians and grassroots activists across the ideological spectrum to express concern about poor and non-white women's access to reproductive healthcare. Just the same, the progress of choice arguments in Congress exposed the challenges feminists faced in advancing similar ideas in the courts. Because of the case-or-controversy requirement, judicial decisions address only those constitutional questions at stake in the litigation.[51] By contrast, Congress and state legislatures can take on larger issues, writing into statutes a more robust vision of what constitutional rights could mean.[52] In particular, legislative bodies can test the distinction between positive and negative rights, creating redistributive remedies.[53] Legislative solutions can unfold incrementally, setting forth a principle and developing a remedial scheme over time.[54] Crucially, legislators are also democratically accountable, and voters can respond to any perceived misstep

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[50] *Id.*
[51] *See, e.g.*, Reva B. Siegel and Robert Post, *Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act*, 112 **YALE L.J.** 1943, 2006 (2003).
[52] *See, e.g.*, William E. Forbath, *The New Deal Constitution in Exile*, 51 **DUKE L.J.** 165, 167 (2001) ("Congress' constitutional duties were not only to safeguard the constitutional bounds and fairness of social and economic legislation, but also to interpret and secure these new positive social and economic rights").
[53] *See, e.g.*, ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENt 308-15 (1994); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 **NW. U. L. REV.** 410, 420-22 (1993).
[54] *See* Siegel and Post, *supra* note 51 at 2006.

in the articulation of important constitutional commitments.[55] In the future as in the past, legislative, rather than juridical, change may offer the more promising path for expanding reproductive liberty. Feminists have already moved in this direction, promoting the Pregnant Workers Fairness Act at the state and federal level.[56]

Just the same, the story of the debates of the 1970s offer surprising perspective on the idea of reproductive choice. Choice arguments divided a broad and diverse antiabortion movement uncertain about the meaning of women's liberation. These arguments brought together women with deeply different views of abortion and gender. Such claims allowed legislators to come together to expand protections against sex discrimination and to place higher value on poor and non-white women's access to health care. The history I've described makes clear that choice arguments can be many things—limited, limiting, uniting, and constantly evolving. Something similar is true of the women who made these arguments, many of whom I spoke to during the research for my book. These women could be conservative or liberal, for or against abortion rights, focused on homemaking or oriented toward their careers, but all of them defy easy categorization.

[55] *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 183 (1999) ("[I]ts constitutional tasks of debate, discussion, and authorization inevitably make Congress a more deliberative [and] public body").

[56] *See, e.g.*, *Philadelphia Enacts Antidiscrimination Law*, **NAT. L. REV.**, Feb. 11, 2014, *available at* http://www.natlawreview.com/article/philadelphia-enacts-pregnancy-accommodation-law (last visited Feb. 24, 2014) (summarizing state laws passed). For discussion of the New York City law, *see, e.g.*, Rachel K. Swarns, *Placed on Unpaid Leave, Employee Finds Hope in New Law*, **N.Y. TIMES**, Feb. 2, 2014, *available at* http://www.nytimes.com/2014/02/03/nyregion/suspended-for-being-pregnant-an-employee-finds-hope-in-a-new-law.html (last visited Feb. 24, 2014).