Choice at Work: Pregnancy Discrimination and Statutory Reproductive Liberty

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Drawing on original archival research and oral histories, this essay rediscovers the lost potential of arguments for reproductive choice in the context of employment law. This history spotlights understudied connections between poverty and reproductive rights, between women on opposing sides of the abortion issue, and between equal-protection and due-process doctrine.

Immediately before and after the decision of *Roe v. Wade*, feminists developed what this Article calls a principle of meaningful reproductive choice. At a minimum, litigators demanded that state actors not place special burdens on women who made one reproductive decision or another. More ambitiously, some feminists suggested that the State may have to act to affirmatively support some fundamental rights. Beginning with *Geduldig v. Aiello*, a line of Supreme Court decisions completely rejected this understanding of reproductive liberty. However, choice arguments rejected in the juridical arena flourished in Congress, during debate about the federal Pregnancy Discrimination Act (PDA).

Significantly, this idea of choice attracted the support of influential abortion opponents committed to an expansion of the welfare state. As part of a broader campaign to outlaw abortion and transform equal-protection doctrine, these pro-lifers embraced a narrow and surprising idea of reproductive liberty. In the aftermath of the *Roe v. Wade* decision, abortion opponents rallied around a constitutional amendment designed to restore the protections the Supreme Court had supposedly destroyed. A diverse group of activists framed their campaign as a defense not only of fetuses but also of all "vulnerable and dependent persons." However, abortion opponents disagreed intensely about who counted as vulnerable and dependent. Led by organizations like American Citizens Concerned for Life, some activists viewed pregnant women as especially vulnerable and deserving of constitutional protection. These groups opposed abortion and campaigned for its prohibition. However, in explaining why women required special solicitude, pro-lifers borrowed from feminists' idea of meaningful choice: by failing to protect women against poverty, and by doing nothing to stop sex discrimination in the workplace, the State had made reproductive liberty a hollow hope.

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. The courts had neither the competence nor the will to fashion redistributive remedies of the kind demanded by some proponents of reproductive choice. Judicial precedents establishing a strong tradition of negative constitutionalism did not bind Congress as they do the Court. Finally, because of the intense controversy surrounding abortion, federal judges with lifetime appointments quickly became reluctant to obstruct democratic debate. A Congress accountable to the people felt freer to experiment with different ideas of reproductive choice.

The PDA modified the reasoning underlying the unconstitutional-conditions doctrine on which feminist litigators had relied. The framers of the PDA described as coercive disability policies that penalized women for taking pregnancy-related leave. As the PDA's sponsors framed it, these penalties burdened an unquestionably constitutional right— a right for women "to continuing their pregnancy and maintaining their jobs at the

same time." While the courts may not view such policies as unconstitutional, Congress concluded that pregnancy discrimination created an impermissible burden on women's reproductive choice.

Just the same, in passing PDA, Congress proceeded incrementally, forging a compromise between feminists, pro-lifers, and business lobbyists. Under the PDA, if the employer chooses to accommodate any employee, that accommodation must be "administered equally for all workers in terms of their actual ability to perform work." While employers had no affirmative duty to support a woman's reproductive decision-making, they could not impose special burdens. As the House Report for the PDA explained, the law required that "pregnant women be treated the same as other employees on the basis of their ability or inability to work."

The history of the meaningful choice principle calls into doubt contemporary judicial interpretations of the PDA. When employers accommodate non-pregnant workers, courts find no violation of the PDA so long as a policy is "pregnancy-blind"—that is, so long as an employer does not explicitly categorize employees on the basis of pregnancy. This history strengthens the case against pregnancy-blind policies under a variety of legal theories, including disparate treatment, disparate impact, and disability accommodation under the Americans with Disabilities Act. In particular, contemporary activists face the same juridical and political problem confronted by supporters of the PDA in the 1970s: explaining how accommodation of pregnant women is something more than reverse sex discrimination. In debate surrounding the PDA, feminists and pro-lifers convinced members of Congress that demands for "special treatment" in fact constituted calls for protection against the unique burdens imposed on women balancing childbearing and careers. The same argument has significant potential for those battling pregnancy blindness today.

Ultimately, however, the history studied here counsels that legislation, rather than litigation, may be the most promising path for expanding protections for pregnant women. At a minimum, grassroots activists could pursue an amendment to the PDA prohibiting discrimination by "pregnancy-blind" policies. More ambitiously, feminists and antiabortion activists could pursue legislation like the Pregnant Workers Fairness Act (PWFA), a law that would force employers to make reasonable accommodations for pregnant workers much like those employers must make available to the disabled. The PWFA would make it unlawful for employers to deny accommodation to pregnant women unless doing so would represent an "undue hardship." Seven states have already passed such accommodation legislation, as have some local governments like the New York City Council.

Tracing the history of liberty norms and the PDA calls into question prevailing interpretations of the protections the statute requires. But perhaps the fact that courts have relied on such a narrow interpretation of Title VII should come as no surprise. Now as before, for those seeking reproductive liberty, the courts may be the last place to look.