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Choice at Work: Young v. United Parcel Service, Pregnancy Discrimination, and Reproductive Liberty

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CHOICE AT WORK: *YOUNG V. UNITED PARCEL SERVICE*, PREGNANCY DISCRIMINATION, AND REPRODUCTIVE LIBERTY

MARY ZIEGLER[†]

ABSTRACT

In deciding *Young v. United Parcel Service*, the Supreme Court has intervened in ongoing struggles about when and whether the Pregnancy Discrimination Act of 1978 (PDA) requires the accommodation of pregnant workers. Drawing on original archival research, this Article historicizes *Young*, arguing that the PDA embodied a limited principle of what the Article calls meaningful reproductive choice. Feminist litigators first forged such an idea in the early 1970s, arguing that heightened judicial scrutiny should apply whenever state actors placed special burdens on women who chose childbirth or abortion.

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 PDA. For a variety of strategic and ideological reasons, legal feminists and antiabortion activists turned to legislative constitutionalism to give meaning to 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 history of the meaningful-choice principle suggests that while the Court reached the right outcome, *Young* still falls short of providing women the protection intended by the framers of the PDA. By a 6-3 vote, the Court vacated a Fourth Circuit decision vindicating United Parcel Service's "pregnancy-blind" employment policy—that is, the policy effectively excluded pregnant workers but did not formally categorize them on the basis of pregnancy. In its application of the *McDonnell-Douglas* burden-shifting analysis, *Young* removed some of the obstacles previously faced by pregnant workers relying on disparate treatment theories. However, the Court still assumes that employers could have legitimate reasons for discriminating against pregnant workers beyond their ability to do a job, creating precisely the kind of burdens on reproductive decision-making that the PDA was supposed to eliminate.

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The history of the meaningful-choice principle strengthens the arguments against pregnancy-blind policies that are available after *Young*, including disparate treatment, disparate impact, and disability accommodation under the Americans with Disabilities Act. Ultimately, however, the history studied here shows that the promise of litigation after *Young* may well still be limited. Legislation, rather than litigation, may be the most promising path for expanding protections for pregnant women.

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INTRODUCTION

In recently deciding *Young v. United Parcel Service*,[1] the Supreme Court has intervened in ongoing struggles about when and whether the Pregnancy Discrimination Act of 1978 (PDA) requires the accommoda-

1. Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338 (2015).

tion of pregnant workers.[2] In *Young*, a United Parcel Service (UPS) employee asked for a light-work assignment after her doctor advised her not to lift more than twenty pounds for the first twenty weeks of pregnancy.[3] UPS refused, citing a company policy of accommodating only employees covered by the Americans with Disabilities Act (ADA), workers who lost driving certification from the Department of Transportation (DOT), or workers injured on the job.[4] UPS's policy stands as a prominent example of the "pregnancy-blind" policies previously approved by many federal circuit courts—policies that exclude all pregnant workers without formally classifying on the basis of pregnancy.[5] The Supreme Court vacated the Fourth Circuit's opinion in *Young*, transforming the legal landscape surrounding pregnancy-blind policies.[6]

Drawing on original archival research, this Article historicizes *Young*, revealing the promise and limits of the Court's decision. While the Court removed some of the practical obstacles in the way of challenges to pregnancy-blind policies, *Young* still fails to capture one of the purposes underlying the PDA—preventing employers from placing special burdens on women's procreative decisions. The PDA embodied a limited principle of what the Article calls meaningful reproductive choice—a guarantee that women would have neither special protections nor special burdens placed on their reproductive decisions. By ignoring this principle, *Young* may sometimes allow employers to ignore the mandate of the PDA.

The Article proceeds in four parts. Part I situates *Young* historically, chronicling the successful legislative constitutional project pursued by the proponents of the PDA. The idea of meaningful choice embodied in the PDA first took shape in the early 1970s when feminist litigators argued that heightened judicial scrutiny applied when the State placed special burdens on women either because they chose to bring a pregnancy to term or to terminate it. More ambitiously, some feminists suggested that the State may have to act to affirmatively support some fundamental rights.

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2. For examples of court decisions elaborating on pregnancy-blindness theory under Title VII, see *Young v. United Parcel Serv., Inc.* (*Young I*), 707 F.3d 437, 447–51 (4th Cir. 2013), *amended and superseded by* Young v. United Parcel Serv., Inc., 784 F.3d 192, *subsequent determination*, 2015 WL 2058940 (2015); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312–13 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207–08 (5th Cir. 1998), *abrogated by Young II*, 135 S. Ct. 1338 (2015).

3. *Young I*, 707 F.3d at 441.

4. *Id.*

5. *See supra* note 2 and accompanying text.

6. *Young II*, 135 S. Ct. 1338 (2015).

A line of Supreme Court decisions completely rejected this understanding of reproductive liberty.[7] However, choice arguments rejected in the juridical arena flourished in Congress during debate about the PDA. For a variety of strategic and ideological reasons, legal feminists and antiabortion activists turned to the legislative arena to give meaning to 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.

As Part I shows, the story of the PDA makes apparent the transformative potential of choice arguments widely derided by academic commentators. The history presented here reveals the lost potential and complexity of choice arguments, particularly outside the abortion context. These claims allowed feminists to flesh out the relationship between poverty and reproductive healthcare. Significantly, such arguments also helped to build an influential, if troubled, coalition between women on opposing sides of the abortion issue.

Part II examines the reasons for the decline of meaningful-choice arguments. Starting in the late 1970s, as abortion opponents scored victories in Congress and the states, and as Ronald Reagan successfully popularized arguments centered on small government and individualism, feminists sought out a more compelling justification for abortion rights. In the process, commentators and activists highlighted the shortcomings of framing reproductive rights as a matter of privacy or choice.

Drawing on the history of the meaningful-choice principle, Part III evaluates contemporary judicial interpretations of the PDA, including both the Supreme Court and Fourth Circuit's opinions in *Young*. Prior to the Supreme Court's decision in *Young*, the federal circuit courts generally upheld pregnancy-blind policies—employer rules that excluded pregnant workers but did not facially discriminate against them.[8] In *Young*, the Supreme Court rejected both the employer and the employee's interpretations of the PDA.[9] UPS argued that the PDA had nothing to do with accommodation, simply adding pregnancy to the protected classes covered by Title VII.[10] By contrast, Peggy Young claimed that

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7. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 322–26 (1980) (rejecting a constitutional challenge to a federal ban on publicly funded abortions); Maher v. Roe, 432 U.S. 464, 478–80 (1977) (rejecting constitutional challenge to state ban on publicly funded abortions); General Electric Co. v. Gilbert, 429 U.S. 125, 142–46 (1976) (rejecting a challenge to a pregnancy exclusion under Title VII of the Civil Rights Act of 1964), *superseded by statute as recognized in* General Electric Company v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484, 494–97 (1974) (rejecting an equal-protection challenge to the exclusion of pregnancy in California state disability policy), *superseded by statute as recognized in* Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

8. For examples of court decisions elaborating on pregnancy-blindness theory under Title VII, see *supra* note 2 and accompanying text.

9. *Young II*, 135 S. Ct. at 1352–54.

10. Brief for Respondent at 11–12, *Young II*, 135 S. Ct. 1338 (No. 12–1226).

the PDA required employers accommodating any employee to offer similar protections to pregnant workers so long as they were "similar in their ability or inability to work."[11] Finding neither interpretation persuasive, the Court focused on how employees could demonstrate disparate treatment.[12] Whereas challenges to pregnancy-blind policies previously failed at the prima facie case stage,[13] under *Young*, a policy treating pregnant workers differently from other workers similar in their inability to work may help a worker make out a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*'s[14] burden-shifting framework.[15] *Young* also changed how employees could rebut an employer's proffered, neutral reason for discrimination. The Court laid out factors to balance in evaluating pretext, namely, the burden a policy imposed against pregnant workers and the employer's compelling reasons for exclusion.[16] Again, *Young* makes it easier for pregnant workers to prove pretext, requiring employers to offer more convincing explanations for policies that leave out all or most pregnant workers.[17]

Other scholars have explained how decisions vindicating pregnancy-blind policies ignore the history of the PDA's antidiscrimination mandate.[18] However, this Article breaks new ground by showing that *Young* only partly remedied the errors of lower court decisions on pregnancy-blind policies. The PDA wrote into law an intermovement consensus that reproductive liberty required more than freedom from state interference. To be sure, the PDA only partly embraced the constitutional commitments of pro-lifers and feminists. The law did not clearly require

11. Petitioner's Brief at 3–4, *Young II*, 135 S. Ct. 1338 (No. 12–1226) (quoting 42 U.S.C. § 2000e(k) (2012)).

12. *Young II*, 135 S. Ct. at 1353–55.

13. *See, e.g.*, Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 36–37 (2009) (describing court decisions of this kind).

14. 411 U.S. 792 (1973).

15. *Young II*, 135 S. Ct. at 1352–55.

16. *Id.* at 1353–55.

17. *See id.*

18. *See, e.g.*, Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27–32 (1995); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 483–84 (2011) (explaining that pregnancy blindness arguments do "not recognize two lessons that we may glean from historical debates about the costs of reproduction"); Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 614–15 (2010) (criticizing the pregnancy-blindness line of cases); Grossman & Thomas, *supra* note 13, at 49–50; Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 978–1004, 1022 (2013). Other studies explore the best legal solutions to the problem of pregnancy discrimination. *See, e.g.*, Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 21–37 (1985) (generally supporting pregnancy-specific benefits); Linda J. Krieger & Patricia N. Cooney, *The* Miller-Wohl *Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 538–62 (1983) (generally supporting pregnancy-specific benefits); Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1052–59 (1987) (generally supporting pregnancy-specific benefits); *cf.* Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2214–20 (1994) (proposing an insurance system for pregnancy leave).

employers to accommodate any employees, including pregnant women.[19] Just the same, as this Article argues, if an employer elected to accommodate any worker, the mandate of the PDA made clear that employers had a duty to provide pregnant women with the accommodations available to those with a similar physical capacity to work. By requiring only pregnancy-blind policies, the courts have allowed employers to burden women's reproductive decisions in precisely the way the PDA sought to prevent.

The history considered here supports the outcome in *Young*, questions core premises of the decision, and strengthens the case against pregnancy-blind policies in the courts under a variety of theories, including disparate impact and disability accommodation under the ADA.[20] Just the same, historical context exposes the limitations of litigating for pregnant workers. In the future, as in the past, legislation, rather than litigation, may prove to be a more promising path for women seeking protection against pregnancy discrimination.

I. CREATING A RIGHT TO MEANINGFUL CHOICE

Young figures centrally not only in the evolving story of employment discrimination law but also in the evolution of arguments about the meaning of reproductive liberty. In the 1970s, as the Article shows, feminists and certain abortion opponents rallied around an idea of choice at work, contending that the government could not constitutionally burden one reproductive choice available to women more than another. By the end of the 1970s, in cases involving pregnancy, disability, and abortion, the Supreme Court cast doubt on the validity of this approach, particularly in the context of reproductive liberty.[21] At first, it seems that decisions like *Geduldig v. Aiello*[22] and *Maher v. Roe*[23] hollowed out protections of

19. *See, e.g.*, Dinner, *supra* note 18, at 464 ("The text and legislative history of the PDA did not clarify whether the PDA requires, or even allows, measures beyond equal treatment to accommodate pregnancy and childbirth.").

20. Under Title VII, disparate treatment cases prohibit intentional discrimination against a member of the protected class on the part of the employer and her agents. *See, e.g.*, Michelle A. Travis, *The PDA's Causation Effect: Observations of an Unreasonable Woman*, 21 YALE J.L. & FEMINISM 51, 64 (2009) ("In disparate treatment claims, pregnant women allege that their employers intentionally took an adverse action against them because of their pregnancy."). By contrast, disparate impact cases ask whether a facially neutral employment practice has an unjustifiably disproportionate impact on members of a protected class unless that practice is "'job-related' and 'consistent with business necessity.'" *Id.* at 70–72 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012)). The ADA and the Americans with Disabilities Amendments Act (ADAA) mandate that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability" in hiring, firing, compensation, training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a) (2012). A "qualified individual" with a disability is one who "with or without reasonable accommodation, can perform the essential functions" of a job. 42 U.S.C. § 12111(8). The ADA and ADAA require that employers reasonably accommodate their disabled employees as part of its nondiscrimination scheme. 42 U.S.C. § 12112(b)(5)(A).

21. *See infra* notes 22–25 and accompanying text.

22. 417 U.S. 484 (1974).

23. 432 U.S. 464 (1977).

reproductive liberty. *Geduldig* held that pregnancy discrimination did not count as sex discrimination under the Equal Protection Clause,[24] while *Maher* concluded that states could choose to fund childbirth, but not abortion, without running afoul of the privacy right recognized in *Roe*.[25] These decisions blocked efforts to flesh out the relationship between reproductive liberty and equality; *Geduldig* ratified sex stereotypes surrounding pregnancy and undermined any challenge to them, and *Maher* upheld laws banning the use of public monies for abortion, reasoning that the right to privacy did not entitle women to the means to exercise their rights.[26] These decisions stood in the way of attempts to recognize rights to state support as well as freedoms from state intervention.[27]

However, as this Part argues, *Geduldig* and *Maher* did not undercut efforts to secure meaningful reproductive choice. Instead, failures in the courts forced legal feminists and pro-life activists to express their constitutional commitments in the legislative arena.

This Part charts the evolution of meaningful-choice arguments, beginning with their development in pregnancy disability litigation in the early 1970s. After the Supreme Court's decision in *Roe v. Wade*,[28] feminists developed an argument that substantive due process limited the State's ability to burden reproductive decision-making.[29] Some went further, suggesting that in the case of certain crucial rights, the government had to ensure that individuals could effectuate the rights they had.[30]

As the Part examines next, the Supreme Court ultimately found these arguments unconvincing. Just the same, the Part shows that in the battle for the PDA, pro-life and abortion-rights activists rejected the Court's understanding of reproductive privacy, insisting that meaningful choice existed only when the government protected women from workplace discrimination and the burdens of poverty. These arguments helped to shape the PDA and influenced some of its most powerful supporters in

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24. *Geduldig*, 417 U.S. at 495–96.

25. *Maher*, 432 U.S. at 474–75.

26. *See, e.g.*, Dinner, *supra* note 18, at 467 ("The majority opinion in *Geduldig* reflected an emerging reluctance, in both the race and the sex contexts, to interpret the constitutional prohibition on discrimination to reach structural inequality as well as discriminatory intent."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 985 (1984) ("*Geduldig* has made it more difficult to claim that reproductive freedom is an aspect of sex-based equality.").

27. *See, e.g.*, Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 725, 748–50 (1981); Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 759 & n.39 ("[A] Constitution of negative rights does not require the government to fund the exercise of positive rights.").

28. 410 U.S. 113 (1973).

29. *See, e.g.*, Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 404–05 (2010).

30. *See, e.g.*, Motion for Leave to File Brief Amici Curiae and Annexed Brief of the American Public Health Ass'n, Planned Parenthood Federation of America, Inc., the National Organization for Women and Certain Medical School Deans, Professors and Individual Physicians at 11–12, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).

Congress. Significantly, as embodied in the PDA, this reasoning stands in obvious tension with the Fourth Circuit's decision in *Young* and the federal courts' embrace of pregnancy blindness.

A. Feminists Bridge the Gap Between Poverty Law and Reproductive Liberty

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.[31] Grassroots activists organized groups like the National Welfare Rights Organization (NWRO) and demanded not only fair procedures governing welfare benefits but also asserted a right to live connected to state support.[32] Similar arguments caught on in the legal academy. Citing the "increasing size of government as an economic unit," Professor William Van Alstyne called for the abolition of the right-privilege distinction in the context of certain state-created "privileges" involving employment, housing, income replacement, and food stamps.[33] Charles Reich's "new property" theory proposed that certain government-created statuses—such as professional licenses and public benefits—should count as forms of property protected by the Due Process Clause—property that could be taken away only after a benefits-holder took advantage of crucial procedural protections.[34] Welfare rights proponents like Frank Michelman interrogated the distinction between positive and negative rights, suggesting that the Fourteenth Amendment might actually guarantee some minimum standard of living for the poor.[35]

As feminists began to explore the limits of reproductive liberty, they echoed the reasoning of Supreme Court cases that fueled poverty lawyers' demands for positive rights: *Shapiro v. Thompson*[36] and *Dandridge v. Williams*.[37] In *Griswold v. Connecticut*[38] and *Eisenstadt v. Baird*,[39] the

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31. *See, e.g.*, Brenna Binns, *Fencing Out the Poor: The Constitutionality of Residency Requirements in Welfare Reform*, 1996 WIS. L. REV. 1255, 1259 ("As a result of the welfare rights movement, the Court gave welfare litigation higher scrutiny and recognized welfare benefits as a right, rather than a privilege, of the poor.").

32. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 76 (1993); FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA 143 (2007).

33. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442, 1461–62 (1968).

34. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734, 783–84 (1964).

35. *See, e.g.*, Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9–13 (1969). For further discussion of the history of the welfare rights movement, see, for example, DAVIS, *supra* note 32; KORNBLUH, *supra* note 32; PREMILLA NADASEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES (2005). On the history of welfare rights litigation in the Supreme Court, see, for example, ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).

36. 394 U.S. 618 (1969).

37. 397 U.S. 471 (1970).

38. 381 U.S. 479 (1965).

39. 405 U.S. 438 (1972).

Supreme Court had suggested that the Constitution offered some protection for crucial decisions involving reproduction.[40] 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."[41]

These efforts began in the litigation of *Dandridge* itself, a case involving a constitutional challenge to Maryland's maximum-grant law.[42] The statute capped payments under the state's Aid to Dependent Families with Children regardless of the size of a beneficiary's family.[43] While the Maryland law did nothing to stop women from having children, the maximum-grant policy penalized those with larger families.[44] The *Dandridge* appellees argued before the Supreme Court that such a penalty violated the Constitution:

> This Court has left no doubt that, while under certain exceptional circumstances infringement, by government, of this right of procreation and marital privacy will be upheld, it constitutes impermissible invidious discrimination to discourage one class of individuals from exercising these basic rights while zealously safeguarding the exercise of those rights by others similarly situated.[45]

When the Court decided *Dandridge*, the justices made no mention of fundamental rights to procreate, indeed retreating from positions taken in earlier poverty-law decisions.[46] *Dandridge* rejected poverty lawyers' challenge to the Maryland maximum grant law, but in spite of the decision, the premise of the appellees' brief—that some form of heightened scrutiny ought to apply to laws that burdened procreative rights—inspired legal feminists intent on testing the boundaries of reproductive liberty.[47]

Prior to 1974, these arguments figured centrally in the litigation of discriminatory leave policies affecting public school teachers and Air

40. On the state of the privacy right in the aftermath of *Eisenstadt*, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 542–97 (1994).

41. Motion for Leave to File Brief as Amici Curiae and Annexed Brief of the American Public Health Ass'n, Planned Parenthood Federation of America, Inc., the National Organization for Women and Certain Medical School Deans, Professors and Individual Physicians at 11–12, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440) [hereinafter Annexed Brief].

42. *Dandridge*, 397 U.S. at 473.

43. *Id.* at 473–74.

44. *See id.* at 473–75

45. Brief for Appellees at 32, *Dandridge*, 397 U.S. 471 (No. 131) (footnote omitted).

46. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264–66 (1970). *Dandridge* rejected challenges to the Maryland law involving both the federal Social Security Act and the Equal Protection Clause of the Fourteenth Amendment. *Dandridge*, 397 U.S. at 482–83, 486–87.

47. On the history of these efforts, see Dinner, *supra* note 18, at 445–47, 449–57. For more on *LaFleur* and reproductive liberty, see Tracy A. Thomas, *The Struggle for Gender Equality in the Northern District of Ohio*, *in* JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 165, 165–83 (Paul Finkelman & Roberta Sue Alexander eds., 2012).

Force service personnel, including *Struck v. Secretary of Defense*,[48] a case famously litigated by ACLU attorney Ruth Bader Ginsburg.[49] In her brief in *Struck*, Ginsburg contended:

> The discriminatory treatment required by the challenged regulation, barring pregnant women and mothers from continued service in the Air Force, reflects the discredited notion that a woman who becomes pregnant is not fit for duty, but should be confined at home to await childbirth and thereafter devote herself to child care. Imposition of this outmoded standard upon petitioner unconstitutionally encroaches upon her right to privacy in the conduct of her personal life.[50]

Other pregnancy discrimination cases elaborated on Ginsburg's claim that discriminatory policies unconstitutionally burdened women's substantive due process rights. In *Cleveland Board of Education v. LaFleur*,[51] Jane Picker and her colleagues challenged a maternity leave policy requiring schoolteachers to take eight months of leave without pay.[52] Picker argued that "[t]he waiting period in *LaFleur* thus penalize[d] Respondents' fundamental right to bear children."[53]

These arguments represented an early form of what the Article calls meaningful-choice reasoning. Even if hirers had no constitutional duty to assist women seeking to effectuate their procreative rights, feminists argued that the Equal Protection Clause prevented employers from conditioning a woman's economic security on her surrender of procreative rights.[54] Insofar as the Constitution protected reproductive liberty, employers could not force women to choose between bearing children and attaining the economic security available to other workers. When the courts identified such an unfair choice, heightened judicial scrutiny should apply.

More ambitiously, legal feminists joined poverty lawyers in questioning the logic underlying the right-privilege distinction in constitutional law. In 1892, Justice Oliver Wendell Holmes articulated the distinction between a protected right and a mere privilege.[55] In *McAuliffe v.*

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48. Struck v. Sec'y of Def., 460 F.2d 1372 (9th Cir.), *vacated*, 409 U.S. 1071 (1972). The Supreme Court would ultimately dismiss Struck's appeal as moot. Struck v. Sec'y of Def., 409 U.S. 1071, 1071 (1972).

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

50. Brief for the Petitioner at 52, Struck, 409 U.S. 1071 (No. 72-178) (footnotes omitted).

51. 414 U.S. 632 (1974).

52. Brief for Respondents at 44, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (No. 72-777).

53. *Id.* at 45.

54. *See, e.g.*, Brief for the Petitioner at 50–56, *Struck*, 409 U.S. 1071 (No. 72-178).

55. On Holmes' early framing of the right-privilege distinction, see Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 384 (2010).

City of New Bedford,[56] Holmes rejected the claim of a policeman, who had been fired for violating a law restricting certain political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[57] In the late 1960s and early 1970s, the right-privilege distinction came under fire, as legal academics and attorneys sought to carve out exceptions to it.[58] Feminist litigators hinted at the existence of a hierarchy of constitutional rights: some were so fundamental that the State had an affirmative duty to guarantee their effectuation.[59]Feminists suggested that reproductive liberty might occupy a place at the top of that hierarchy of rights.[60]

In the juridical arena, meaningful-choice arguments peaked during the litigation of *Geduldig*, a challenge to the constitutionality of the pregnancy exclusion in the California Disability Fund.[61] Significantly, *Geduldig* came before the Supreme Court in the aftermath of *Roe v. Wade*. In that case, the Court had invalidated the abortion restrictions then on the books, suggesting that the constitutional right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[62] The *Roe* Court limited the abortion right in several ways: by assigning it at least equally to the woman's physician and by creating a trimester framework that gave the states more regulatory authority in the second and third trimesters of pregnancy.[63] Just the same, legal feminists read their victory in *LaFleur* as an extension—and clarification—of the right announced in *Roe*. In *LaFleur*, the Supreme Court had struck down an eight-month mandatory leave policy because it "employ[ed] irrebuttable presumptions that unduly penalize a [woman] . . . for deciding to bear a child."[64] While resting on procedural due process, *LaFleur* fueled feminist arguments about the scope of reproductive liberty.[65]

Feminist attorney Wendy Webster Williams, who argued *Geduldig* before the Supreme Court, read *LaFleur* as an expansion of the liberty recognized in *Roe*.[66] Citing *LaFleur*, Williams's brief reasoned that "[t]he strict scrutiny test is applicable not only where the denial of a fun-

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56. 29 N.E. 517 (Mass. 1892), abrogation recognized by O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996).

57. *Id.* at 517.

58. *See, e.g.*, Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389, 1428–34 (2000) (describing the attacks that convinced "the Court [to] repudiate[] the rights/privileges distinction").

59. *See, e.g.*, Annexed Brief, *supra* note 41, at 11–12.

60. *See, e.g.*, *id.*

61. Geduldig v. Aiello, 417 U.S. 484, 486 (1974), *superseded by statute as recognized in* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

62. Roe v. Wade, 410 U.S. 113, 153 (1973).

63. *Id.* at 152–63.

64. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648 (1974).

65. *See, e.g.*, Dinner, *supra* note 55, at 404–05 (recovering the "multiple, expansive meanings" of *LaFleur* for legal feminists).

66. *See* Brief for Appellees at 52–54, *Geduldig*, 417 U.S. 484 (No. 73-640).

damental right is absolute, but also where state regulation penalizes its free exercise."[67] In Williams's account, pregnancy discrimination counted as the kind of penalty on reproductive choice forbidden by the Constitution:

> Unlike *any other* disabled worker in the State of California covered by the state disability insurance program, the woman who suffers a disability in connection with her pregnancy is left to bear the economic consequences of her inability to work. As a result of her pregnancy, a woman faces medical bills, the possible cost of temporary help and, if her pregnancy is successfully concluded, a new child to support at the very time she is unable to bring home wages to pay for these expenses. . . . The denial of benefits available to other workers therefore constitutes a substantial burden upon her exercise of her right to bear a child and the State must demonstrate a compelling interest in its classification.[68]

An ACLU brief co-signed by Ruth Bader Ginsburg similarly concluded that *Roe* and *LaFleur* had transformed reproductive liberty:

> Under due process principles, the state is required to show that a compelling interest justifies the substantial burden placed upon exercise of the fundamental freedom to decide whether to bear a child. Appellant has not demonstrated any such compelling interest; therefore the treatment of pregnancy-related disabilities violates the due process clause.[69]

Roe had recognized that "the decision whether to continue or to terminate a pregnancy . . . must be left up to the individual . . . lest the state unconstitutionally intrude into the zone of privacy protected by the Constitution."[70] *LaFleur* further narrowed the State's power to regulate reproductive liberty insofar as it "recognized that this zone of privacy with respect to child bearing is unconstitutionally infringed by governmental action which has the effect of burdening women who chose to continue pregnancy rather than terminate it."[71]

Geduldig represented an important opportunity for legal feminists seeking a more robust jurisprudence of reproductive liberty. Feminists highlighted the particularly harsh impact of pregnancy discrimination on poor women—an argument carried forward in challenges to state bans on the Medicaid funding of abortion.[72] For example, in *Klein v. Nassau*

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67. *Id.* at 53.
68. *Id.* at 53–54.
69. Brief Amici Curiae for the American Civil Liberties Union et al. at 7, *Geduldig*, 417 U.S. 484 (1974) (No. 73-640).
70. *Id.* at 25.
71. *Id.*
72. *See, e.g.*, MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 121 (2015).

County Medical Center,[73] a federal district court struck down a directive prohibiting the use of Medicaid funding for abortion, explaining that women choosing abortion "alone are subjected to State coercion to bear children which they do not wish to bear."[74] Constitutionally, as *Klein* recognized, Medicaid bans imposed the same kind of impermissible condition at work in *Geduldig*, denying a woman "medical assistance unless she resigns her freedom of choice and bears the child."[75] Together, abortion and pregnancy disability litigation promised to entrench a much broader understanding of reproductive liberty.

B. The Supreme Court Rejects Meaningful Choice

The Supreme Court rejected the expansive understanding of choice advanced by feminists, adopting the position staked out by both business organizations and some abortion opponents. In *Geduldig*, industry groups and corporations had argued that, under *Roe* and *LaFleur*, pregnancy had become a choice controlled entirely by a woman—something entirely different from the illnesses and injuries often covered by disability policies.[76] For example, in an amicus brief in *Geduldig*, the General Electric Company, a company that did not cover pregnancy under its disability policy, argued:

> Thus pregnancy, unlike any sickness or accident, results from the cumulative, four-fold exercise of free will necessary for a woman to bear a child: (1) there must be a voluntary decision to marry, as marriage still reflects by far the current standard of morality; (2) the couple must elect to have sexual intercourse—a two-person decision; (3) the couple must elect that conception will result—i.e., must elect to reject the various alternative methods available for avoiding pregnancy; and (4) if conception takes place, the couple must elect to accept the pregnancy and have the baby, and not to terminate the pregnancy by abortion. It should also be noted that even for the unmarried, the latter three choices are viable alternatives to the pregnant state.[77]

As General Electric understood it, women already enjoyed true reproductive liberty. As a result, women could not fairly expect an employer to subsidize their procreative decisions, particularly since other workers could not enjoy the same benefits.[78]

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73. 347 F. Supp. 496 (E.D.N.Y. 1972), *vacated by* 412 U.S. 925 (1973).

74. *Id.* at 500. For post-1973 decisions in the same vein, see Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 579–82 (E.D. Pa. 1975); Doe v. Westby, 383 F. Supp. 1143 (D.S.D. 1974), vacated sub nom. Westby v. Doe, 420 U.S. 968 (1975).

75. Klein, 347 F. Supp. at 500.

76. *See, e.g.*, Brief for General Electric Co. as Amicus Curiae at 21–22, *Geduldig*, 417 U.S. 484 (1974) (No. 73-640).

77. *Id.*

78. *See id.* at 6–8.

Later in the 1970s, antiabortion attorneys borrowed from this vision of choice in defending Medicaid funding bans. Defending such a funding restriction in Connecticut, pro-life attorneys stressed that nothing in the law "prevent[ed] a woman from making a choice to have an abortion."[79] The State's responsibility ended with its duty not to prohibit abortion. Beyond that, women themselves bore the costs of indigence and lack of access to medical services. "[U]nder *Roe*," pro-life attorneys explained in *Maher*, "an indigent woman was *not* given *an additional fundamental right* to have an abortion paid for from public funds."[80]

In both *Geduldig* and *Maher*, the Supreme Court thoroughly rejected the meaningful-choice reasoning on which feminists had relied. Decided in 1974, *Geduldig* found that California's disability policy did not discriminate on the basis of sex since there was "no risk from which men [were] protected and women [were] not."[81] Neither the majority nor the dissent mentioned the reproductive-liberty claims emphasized by feminists.[82]

While *Geduldig* failed to mention reproductive liberty, *Maher*, a case involving the constitutionality of bans on the public funding of abortion, suggested that abortion rights guaranteed only a right to be left alone.[83] By conditioning the receipt of support on a woman's surrender of her abortion right, Connecticut placed "no obstacles absolute or otherwise in the pregnant woman's path to an abortion."[84] As *Maher* explained, "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."[85]

Taken together, *Maher* and *Geduldig* limited the promise of reproductive-liberty doctrine in the courts. In 1980, the Court confirmed its rejection of the doctrine in *Harris v. McRae*,[86] upholding the Hyde Amendment, a federal ban on the Medicaid funding of abortion.[87]

However, failure in the courts did not mark the end of efforts to advance meaningful-choice arguments. Indeed, after 1976, in *General*

79. Brief of the Appellant at 14, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).
80. *Id.*
81. *Geduldig*, 417 U.S. at 496–97.
82. On *Geduldig*'s obscuring of the importance of equal sexual liberty, see Kim Shayo Buchanan, Lawrence v. Geduldig*:* *Regulating Women's Sexuality*, 56 EMORY L.J. 1235, 1236–38 (2007). The *Geduldig* dissent failed to make any mention of women's reproductive liberty. *See Geduldig*, 417 U.S. at 498–505 (Brennan, J., dissenting).
83. *Maher*, 432 U.S. at 473–74.
84. *Id.* at 474.
85. *Id.*
86. 448 U.S. 297 (1980).
87. *Id.* at 326–27.

Electric Company v. Gilbert,[88] when the Court rejected arguments that Title VII of the Civil Rights Act of 1964 prohibited pregnancy discrimination,[89] those on opposing sides of the abortion issue revived the constitutional arguments for meaningful reproductive choice rejected by the Court, this time acting in the legislative arena.

Significantly, in the later 1970s, antiabortion activists as well as feminists made some version of meaningful choice a centerpiece of their legal agenda. In the aftermath of the *Roe* decision, antiabortion leaders turned to a variety of constitutional strategies to outlaw most or all abortions, including an Article V amendment campaign.[90] In formulating these responses to *Roe*, pro-lifers defined a new class deserving protection under the Fourteenth Amendment: vulnerable and dependent persons.[91] For the members of groups like American Citizens Concerned for Life (ACCL) and Feminists for Life, pregnant women fit this category perfectly.[92] These pro-life activists recognized that some women turned to abortion because they faced sex discrimination at work.[93] Poor women often faced an impossible choice between exercising procreative liberty and guaranteeing themselves economic security.[94] Recognizing this dilemma, some pro-lifers presented protection from pregnancy discrimination as a precondition for meaningful reproductive choice.[95] Conversely, when the government refused to ensure women protection from sex discrimination, as pro-lifers argued, the government put unconstitutional burdens on women's reproductive choice. Thoroughly rejected by the courts, this understanding of choice reappeared as a robust legislative constitutional norm—one on which activists deeply divided by the abortion issue agreed.

C. Pro-Lifers Work to Redefine Equal Protection of the Law

From the outset, the pro-life movement defined its cause as a constitutional one, based on a fundamental right they identified in the Fourteenth Amendment.[96] At the state and local level, pro-life organizations

88. 429 U.S. 125 (1976), *superseded by statute as recognized in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

89. *See id.* at 136–40.

90. For an overview of pro-life constitutional strategy in the period, see Mary Ziegler, *Ways to Change: A Reevaluation of Article V Campaigns and Legislative Constitutionalism*, 2009 B.Y.U. L. REV. 969, 973–84; *see also* ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 85–87 (2008); Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 128, 143–50 (Donald T. Critchlow ed., 1995).

91. *See, e.g.*, ZIEGLER, *supra* note 72, at 28–29, 34, 45.

92. For a study of these groups and their influence on pro-life constitutionalism, see Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 237–46 (2013).

93. *See* Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 993–98 (2014).

94. *See id.*

95. *See id.*

96. *See* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 B.Y.U. L. REV. 869, 884–86.

mobilized in the late 1960s to preserve existing bans on abortion.[97] Groups like the Southern California Right to Life League, New York State Right to Life, and the Illinois Right to Life Committee chose names that referred to the "right to life" mentioned in the Declaration of Independence.[98] The same constitutional commitment defined the pre-1973 agendas of national organizations like the National Right to Life Committee (NRLC) and Americans United for Life (AUL). "Protecting the right to life of the unborn child," the NRLC Statement of Purpose asserted, "is a central issue to the National Right to Life Committee."[99] Similarly, the AUL's Declaration of Purpose similarly explained: "Believing with those who hold that all men are created equal, we proclaim that among our precious civil and natural liberties and rights is the responsibility of society to safeguard the integral life of every human being from conception to natural death."[100]

Over the course of the late 1960s and early 1970s, antiabortion activists began to ground their normative commitments in existing constitutional doctrine. Significantly, abortion opponents identified their cause with both substantive due process and equal protection doctrine.[101] Working in emerging national groups like the NRLC and the AUL, prolifers forged an argument based on the overlap of liberty and equality norms, training their fire on laws that denied vulnerable groups the implicit right to life.[102]

Activists like Robert Byrn, a grassroots organizer and Fordham law professor, presented dependency as a classic suspect classification, and Byrn argued that abortion represented precisely the kind of invidious discrimination that the Equal Protection Clause was designed to root out.[103] In particular, Byrn compared fetuses to illegitimate children, a group afforded some protection by the Supreme Court in the late 1960s.[104] For example, in 1968, in *Levy v. Louisiana*,[105] the Court had

97. On the mobilization of pro-life activists, see *supra* note 90 and accompanying text.

98. On the naming of the Right to Life League of Southern California and New York State Right to Life, see Fred C. Shapiro, *'Right to Life' Has a Message for New York State Legislators*, N.Y. TIMES, Aug. 20, 1972, at SM10, SM34. On the early activity of the Right to Life League of Southern California, see Keith Monroe, *How California's Abortion Law Isn't Working*, N.Y. TIMES, Dec. 29, 1968, at SM10–12. On the founding of the Illinois Right to Life Committee, see SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 35 (1991).

99. National Right to Life Committee Statement of Purpose (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

100. Americans United for Life, Declaration of Purpose (1974) (on file with Concordia Seminary, St. Louis, Missouri in The Executive File).

101. ZIEGLER, *supra* note 72, at 29, 85.

102. *See id.* at 28–35, 85.

103. *See, e.g.*, Robert M. Byrn, *Demythologizing Abortion Reform*, 14 CATH. LAW. 180, 183 (1968). For further examples of pro-lifers' reliance on the Equal Protection Clause, see David W. Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 234 (1968–69).

104. Byrn, *supra* note 103, at 183.

105. 391 U.S. 68 (1968).

first struck down an illegitimacy classification, explaining, "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[106]

Byrn saw abortion as the type of discrimination that *Levy* condemned. *Levy* suggested that any child qualified as a legal person if she was human and alive[107]—criteria which, in Byrn's view, clearly applied to the unborn child.[108] The traits that differentiated the unborn child from other Americans—age, vulnerability, and dependency—made no constitutional difference.[109] Indeed, the dependent required additional constitutional and other legal protections. Highlighting President Lyndon Johnson's War on Poverty, Byrn insisted: "The more dependent and helpless a person is, the more solicitous the law is of his welfare."[110]

Like Byrn, other pro-lifers deployed a theory of equal liberty, insisting that the Constitution recognized an implicit right to life that had to be equally available to the unborn child. For example, Martin McKernan of the NRLC emphasized: "All in all, the law has consistently established certain procedural safeguards around fundamental rights to which the unborn was entitled. That most fundamental of rights - not to be deprived of life without due process of the law - cannot be ignored."[111]

Activists like Byrn and McKernan did not address the ways in which unborn children did not resemble a suspect class: there was no obvious history of discrimination against fetuses, and neither age nor dependency was immutable—as Byrn acknowledged, both represented phases experienced by every citizen who reached adulthood.[112] Moreover, like some gender distinctions, physical disability and dependency could constitute real biological differences.[113] From the standpoint of conventional equal protection law, a fetus may not be similarly situated to a child, and a person in a persistent vegetative state may not be comparable to a legally competent adult.

While claiming that protections for unborn children fit within a conventional equal-protection framework, pro-lifers like Byrn actually

106. *Id.* at 70 (footnote omitted).
107. *See id.*
108. *See* Byrn, *supra* note 103, at 183.
109. Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. U. L. REV. 125, 127–34 (1966–67).
110. *Id.* at 133.
111. Legal Report from Martin F. McKernan, Jr., Nat'l Right to Life Comm. 4 (Jul. 1970) (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).
112. *See* Byrn, *supra* note 109, at 128.
113. Indeed, in determining whether disability discrimination warranted heightened scrutiny under the Equal Protection Clause, the Court emphasized that disabled persons had real impairments that justified different legislative treatment. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442–45 (1985).

demanded a bold reconceptualization of the doctrine. Conventional equal-protection doctrine focused on whether vulnerable individuals had an immutable trait, like race or gender.[114] Activists like Byrn implicitly conceded that the unborn children had no such trait. Indeed, pro-lifers presented abortion as discriminatory precisely because it deprived unborn children of life, notwithstanding the fact that they resembled other rights-holders in every constitutionally salient way.[115] Strategically, this move allowed antiabortion activists to respond to claims that fetuses did not count as legal persons under the Fourteenth Amendment.[116] 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.[117]

In 1973, the *Roe* Court rejected many of the premises of pro-life constitutionalism—including the personhood of the fetus and the conclusion that life began at conception—while pushing others entirely below the surface.[118] The district court in *Roe* had applied conventional strict scrutiny in analyzing an abortion regulation, asking whether such a ban was narrowly tailored to serve a compelling justification.[119] This framing set the terms of the Supreme Court's own discussion. In resolving whether the State's interest in protecting life was compelling, the Court highlighted disagreements between medical, philosophical, and religious authorities, concluding that "the unborn have never been recognized in the law as persons in the whole sense."[120] The Court touched only indirectly on the question of a right to life, assuming that "[i]f . . . [fetal] personhood is established," the case for abortion rights would collapse, "for the fetus' right to life would then be guaranteed specifically by the [Four-

114. *See* 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]" (quoting Bowen v. Gilliard, 483 U.S. 587, 602 (1987))).

115. *See, e.g.*, Louisell, *supra* note 103, at 247 ("Medical evidence would indicate that the various stages of development [were] merely labels which have been placed upon what is in fact the steady, constant growth of the human being.").

116. *See, e.g.*, Motion and Brief Amicus Curiae of Certain Physicians, Professors and Fellows of the American College of Obstetrics and Gynecology in Support of Appellees at 26, 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."); Motion for Leave to Submit a Brief Amici Curiae Brief of Women for the Unborn et al. in Support of Appellees at 9, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18) ("Modern genetics has confirmed scientifically what women have long felt intuitively—the presence of another human life, a life to be reverenced and protected.").

117. *See, e.g.*, Press Release, Nellie J. Gray, Chairman, Nat'l March for Life Comm. (Jan. 22, 1974) [hereinafter NMLC Press Release] (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

118. *See Roe*, 410 U.S. at 153–64.

119. Roe v. Wade, 314 F. Supp. 1217, 1222–23 (N.D. Tex. 1970), *rev'd*, 410 U.S. 113 (1973).

120. *Roe*, 410 U.S. at 157–63.

teenth] Amendment."[121] By dismissing the idea that the framers of the Fourteenth Amendment defined fetuses as persons, the Court went no further in exploring whether the Constitution recognized a right to life.[122]

Movement leaders responded by working harder than ever to revolutionize equal-protection jurisprudence, pushing powerlessness and helplessness as the center of constitutional analysis. Nellie Gray's March for Life, an organization leading a major pro-life protest of the same name, issued materials explaining: "If our Constitution, as now interpreted, cannot guarantee the right to be secure in one's person in order to be born, it cannot long protect the right to be secure in one's person during illness, physical and mental disability, [and] senility . . . ."[123]

Partly for this reason, the fetal-protective amendment preferred by many pro-lifers advanced a right to equal treatment not only for the unborn but also for any similarly vulnerable individuals.[124] A variety of Article V amendments proposed in Congress would have changed the meaning of the Fourteenth Amendment, explicitly including the unborn as persons.[125] However, leaders of groups like the NRLC and AUL insisted that their movement demanded protection for all vulnerable and dependent persons. The NRLC endorsed an amendment that would require protection of life regardless of age, health, function or condition of dependency.[126] Dr. John Willke of the NRLC insisted that "civil rights [under the Fourteenth Amendment] mean nothing if they do not protect the weakest and most helpless of the humans among us."[127] He asked: "[S]hould we allow the Supreme Court to define the right to life on the basis of age and place of residence?"[128]

D. Pro-Life Activists Contest the Meaning of Dependency and Vulnerability

While antiabortion activists shared a vision of the Equal Protection Clause, movement members disagreed intensely about who counted as vulnerable and dependent persons. Some movement members focused exclusively on the abortion issue, while others also mobilized to battle living-will and death-with-dignity laws.[129] Still others viewed pregnant women, and perhaps all women, as vulnerable, dependent, and deserving

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121. *Id.* at 156–57.
122. *See id.*
123. NMLC Press Release, *supra* note 117.
124. ZIEGLER, *supra* note 72, at 29.
125. *See, e.g.*, *id.* at 43–45.
126. *See* NMLC Press Release, *supra* note 117.
127. *Proposed Constitutional Amendments on Abortion: Hearings on Proposed Constitutional Amendments on Abortion Before the Subcomm. on Civil and Constitutional Rights of H. Comm. on the Judiciary*, 94th Cong. 399 (1976) (Statement of Dr. John Willke).
128. *Id.* at 405.
129. On the diversity of motives and tactics characterizing pro-life activism in the period, see, for example, MUNSON, *supra* note 90, at 192; and see also CAROL J. C. MAXWELL, PRO-LIFE ACTIVISTS IN AMERICA: MEANING, MOTIVATION, AND DIRECT ACTION 2, 8, 21 (2002).

of protection. These activists expressed themselves in the conventional rhetoric of the pro-life movement, demanding a reworking of equal-protection doctrine. However, as this Part shows, these advocates moved toward a radical reconceptualization of the movement's goals, one centered partly on women's constitutional interests in liberty and equality. These activists turned to meaningful choice in advocating what they viewed as both protections against sex discrimination and alternatives to abortion. To be sure, antiabortion advocates disagreed with feminists about the meaning of reproductive liberty.[130] They insisted that the State should ban all, or most, abortions—and could do so without denying women constitutional autonomy.[131] At the same time, some influential pro-life activists maintained that women did not have the freedom to choose childbirth or procreation unless the State protected them against sex discrimination.[132]

During the battle for an Article V amendment recognizing a right to life, members of ACCL , an influential antiabortion organization, began to develop an argument that combined antidiscrimination and reproductive-liberty reasoning. In testifying in favor of an Article V amendment banning abortion, Dorothy Czarnecki of the ACCL argued:

> It is my opinion that women are equal to but not the same as men. In the natural order of things, this will never change. Women deserve equal rights, equal pay, equal job opportunities, and equal[ity] under the law. Women ought to have the right over their own bodies, insofar as they can determine whether or not they shall become pregnant. They deserve to be educated. Equal opportunity means that, rich or poor, black or white, they shall [be able] . . . to receive sex education, and contraceptive information . . . . It does not mean that we shall supply abortion to those who cannot afford it.[133]

Czarnecki endorsed an idea of choice that seemed incoherent to feminists who saw the connection between abortion rights, autonomy, and equality for women. At the same time, Czarnecki agreed with feminists that formal equality was not enough to guarantee women meaningful reproductive choice. "Equal opportunity" involved neither abortion nor identical treatment: women's special vulnerability meant that they needed and deserved assistance in accessing sex education and contraception.[134] Czarnecki's vision of equality for women would drive pro-life support for the PDA. Members of groups like the ACCL concluded that pregnancy made women biologically and culturally different, vulnerable

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130. *See* Ziegler, *supra* note 93, at 982.

131. *See id.*

132. *See id.*

133. *Abortion—Part 2: Hearing on S.J. Res. 119 and S.J. Res. 130 Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 93d Cong. 312 (April 1974) (Statement of Dorothy Czarnecki).

134. *See id.*

to pernicious forms of discrimination.[135] Equal treatment for pregnant women would require some affirmative intervention on the part of the State—to end discrimination and to ensure pregnant women a minimum level of income, healthcare, and child care.

In 1975, while still pushing an Article V amendment, Marjory Mecklenburg of the ACCL modified the reproductive-liberty reasoning used in the litigation of *Geduldig*.[136] First, Mecklenburg testified that pregnant women represented a key example of the vulnerable persons currently denied the protection of the Constitution. Asking Congress to pay more attention to the women who wanted to continue a pregnancy, Mecklenburg asserted that such women constituted "a disadvantaged class."[137] Pregnant women were vulnerable partly because the government 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 or to terminate based on economic conditions. If they feel pressured because of the economic situation, we can ask what kind of a choice do they really have?"[138]

By 1975, activists like Mecklenburg had elaborated on this idea of choice, translating it into a powerful vision for legislative change. Mecklenburg lobbied for a number of laws designed to help 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.[139] In February 1975, Mecklenburg came out in favor of the School Age Mothers and Children Act of 1975, an ultimately unsuccessful social welfare bill sponsored by abortion-rights champions Birch Bayh (D-IN) and Ted Kennedy (D-MA).[140] The law would have guaranteed a variety of family planning, childcare, and healthcare services for adolescent mothers and their children.[141] 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 ag-

135. *See, e.g.*, ZIEGLER, *supra* note 72, at 195–200.

136. *See Abortion—Part IV: Hearings on S.J. Res. 6, S.J. Res. 10, S.J. Res. 11, and S.J. Res. 91 Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 94th Cong. 644–46, 648, 650, 653, 694 (June 1975) (Statement of Marjory Mecklenburg).

137. *Id.* at 654.

138. *Id.* at 648–49.

139. *See id.* at 646, 655–56. This part later discusses several of these lobbying efforts at greater length.

140. *See School-Age Mother and Child Health Act, 1975: Hearing Before the Subcomm. on Health of the S. Comm. on Labor and Pub. Welfare*, 94th Cong. 495–96 (Nov. 1975) [hereinafter *School-Age Mother and Child Act*] (Statement of Marjory Mecklenburg) (on file with author); MARIS A. VINOVSKIS, AN "EPIDEMIC" OF ADOLESCENT PREGNANCY?: SOME HISTORICAL AND POLICY CONSIDERATIONS 50 (1988).

141. *See* VINOVSKIS, *supra* note 140, at 51.

gression."[142] 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 . . . .[143]

The vision of meaningful choice written into laws like the School Age Mother and Child Act assumed that the State had to refrain from burdening women's decisions. Mecklenburg explained: "Americans must examine the pregnant woman's life situation, assess what is necessary to preserve her personal dignity and her mental and physical health, and then provide for these needs. . . . Women must not be forced by circumstances to seek an abortion . . . ."[144]

Prior to 1976, members of the ACCL borrowed heavily from the special-burden reasoning rejected by the courts, giving it new life as a legislative constitutional norm. For legal feminists, special-burden reasoning served a different purpose: rebutting claims that women demanded preferential treatment. As the battle against pregnancy discrimination moved to Congress, business leaders and industry groups insisted that pregnancy disability policies themselves represented discrimination against men.[145] Given the right of reproductive choice, women bore children and then unfairly demanded that someone else foot the bill. For legal feminists responding to these charges, it became crucial to show that women wanted equal, rather than special, opportunities. Reworking the reproductive-liberty reasoning used by some pro-lifers offered feminists a valuable strategy for achieving this task.

E. Feminists Shift from Juridical to Legislative Constitutionalism

In the aftermath of their defeat in *Geduldig*, feminists turned to Title VII of the Civil Rights Act of 1964 as a source of protection against pregnancy discrimination, this time, working with an unlikely set of allies. As the *New York Times* reported in September 1975, "A cause that has managed to unite women from feminists to members of the Right to Life movement is the right to disability benefits for time lost due to

142. *School-Age Mother and Child Act*, *supra* note 140, at 511.

143. *Id.* at 499, 501 (quoting National Council of Churches Study Paper (Mar. 2, 1972)).

144. *Id.* at 511.

145. *See, e.g.*, *Discrimination on the Basis of Pregnancy, 1977: Hearings on S. 995 Before the Subcomm. on Labor of the S. Comm. on Human Resources*, 95 Cong 1st Sess. (1977) 481–88 [hereinafter *Discrimination on the Basis of Pregnancy*] (statement of Brockwell Heylin).

pregnancy."[146] Progress in the courts made Title VII litigation an attractive option: the Second and Third Circuit held that pregnancy discrimination violated Title VII notwithstanding the holding of *Geduldig*.[147] Relying on *LaFleur*, the Supreme Court itself had struck down a Utah law disqualifying women from receiving unemployment insurance for an eighteen-week period preceding and following pregnancy because they were "unable to work."[148] As Kathy Willert Peratis of the ACLU explained: "We're really making headway now."[149]

This progress came to an abrupt halt in 1976 when the Supreme Court decided *General Electric Co. v. Gilbert*. Rejecting the interpretation of Title VII adopted by the Equal Employment Opportunity Commission and many lower courts, the *Gilbert* Court decided that pregnancy discrimination did not count as sex discrimination.[150] *Gilbert* reasoned that what women demanded was not protection against discrimination but rather special treatment, since "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially even-handed *inclusion* of risks."[151]

For legal feminists, *Gilbert*'s reasoning was deeply disappointing. Peratis put the point bluntly, telling the *New York Times*: "We bombed out in court, so we'll have to go to Congress."[152] However, feminists did far more then switch from the juridical to the legislative arena. Instead, organizations like the ACLU and the Women's Legal Defense Fund (WLDF) continued litigating, seeking to carve out a space for Title VII protections in the aftermath of *Gilbert*. In cases like *Nashville Gas Co. v. Satty*,[153] feminists had to work within a *Gilbert* framework that denied women's right to "special treatment" in the context of pregnancy.[154] In turn, *Satty* and *Gilbert* helped to shape the arguments used by both business lobbyists and legal feminists in the battle for the PDA. Business leaders popularized the idea of pregnancy disability as reverse discrimination against men.[155] Since women had the freedom to terminate preg-

146. Virginia Lee Warren, *The Fight for Disability Benefits in Pregnancy*, N.Y. TIMES, Sept. 16, 1975, at 36.

147. On the perceived promise of Title VII litigation in the period, see, for example, *id.*

148. Turner v. Dep't of Emp. Sec. of Utah, 423 U.S. 44, 45 (1975).

149. Warren, *supra* note 146.

150. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 145–46 (1976).

151. *Id.* at 139 (emphasis added).

152. Keith Love, *Pregnancy Sick Benefits: Call for Action on Court Ruling*, N.Y. TIMES, at 46 (Dec. 10, 1976), http://0-search.proquest.com.bianca.penlib.du.edu/docview/122937067?accountid=14608 (quoting Statement by Kathleen Peratis of the ACLU).

153. 434 U.S. 136 (1977).

154. On the constraints faced by feminists after *Geduldig*, see, for example, Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 490–500 (2014).

155. *Discrimination on the Basis of Pregnancy*, *supra* note 145.

nancies, as business leaders asserted, women should have to bear the costs of any children they bore.[156] Forcing employers to do so would result in discrimination against both male employees and business owners. Legal feminists responded by drawing on an idea of impermissible burdens similar to the one set forth in *Satty*.[157] The reliance on the benefit-burden distinction ultimately encouraged feminists working in Congress to turn back to the reproductive-liberty reasoning rejected by the Court.

F. Satty *Plays Up the Benefit-Burden Distinction*

Nora Satty worked as a clerk in the accounting department of the Nashville Gas Company when she became pregnant.[158] The company required Satty to take maternity leave and refused to give her sick pay during her absence.[159] Worse, while she was on leave, the company took away the seniority Satty had already earned.[160] When she reapplied for work, the company placed her in a temporary position and, pursuant to its policy, denied her every permanent position she applied for because other, more senior employees had bid for them.[161] After Satty completed her temporary assignment, the company terminated her "due to lack of work and job openings."[162]

When Satty's case came before the Supreme Court, both her counsel and amici curiae, including the ACLU and the Women's Legal Defense Fund, focused on how Satty's case differed from *Gilbert*. While that case denied "special benefits," Nora Satty's defenders insisted that they wanted nothing more than equal treatment.[163] In a brief signed by Ruth Bader Ginsburg and Susan Deller Ross, the ACLU and WLDF argued that "no 'extra compensation' issue [was] present" in *Satty*.[164] Instead of directly challenging the validity of *Gilbert* or *Geduldig*, the brief shifted the focus to the special burdens imposed on the liberty of Satty and other pregnant women. As the brief explained:

> Although Title VII does not require that greater economic benefits be paid to one sex or the other "because of their different roles in the scheme of existence", [sic] by the same token Title VII hardly permits an employer specifically to burden female employees throughout their working lives because of their different role.[165]

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156. *See, e.g., id.* at 95–97 (statement of the National Association of Manufacturers).
157. *See, e.g., id.* at 451–52 (statement of Letty Cottin-Pogrebin, Editor for *Ms.* magazine).
158. *Satty*, 434 U.S. at 139.
159. *Id.* at 138–39.
160. *Id.*
161. *Id.* at 139.
162. *Id.* at 139.
163. *See, e.g.*, Brief Amici Curiae of American Civil Liberties Union and Women's Legal Defense Fund at 6–8, *Satty*, 434 U.S. 136 (No. 75-536).
164. *Id.* at 7.
165. *Id.*

The brief insisted that Satty and other pregnant women did not request accommodation of their pregnancies.[166] Rather, Satty asked the Court to stop the employer from burdening their ability to work because they had chosen to have children.[167]

In a terse opinion written by Justice William Rehnquist, *Satty* held that some, but not all, pregnancy discrimination violated Title VII.[168] Holding that the Nashville Gas Company's policies violated Title VII, Rehnquist distinguished pregnancy disability policies, which afforded pregnant women "a benefit that men cannot and do not receive," from the burdens imposed in *Satty*.[169] "We held in *Gilbert* that [Title VII] did not require that greater economic benefits be paid to one sex or the other 'because of their differing roles in "the scheme of human existence,"'" Rehnquist explained.[170] "But that holding does not allow us to read [the statute] to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role."[171]

Publicly, legal feminists interpreted *Satty* as a signal that legislative, rather than juridical, constitutionalism represented the most promising path for women seeking equal treatment or reproductive liberty.[172] Since *Satty* did not provide clear guidance about when pregnancy disability policies would run afoul of Title VII, Susan Deller Ross of the ACLU called the decision "confused," reasoning that it "showed the importance of a new Federal law to make all discrimination against pregnant workers illegal."[173]

Rather than simply reinforcing the importance of amending Title VII, *Satty* encouraged feminists to change the temporary-disability paradigm used for much of the early 1970s.[174] Defining pregnancy as a mere temporary disability had worked to dispel the myth that women who bore children necessarily left work to raise them.[175] At the same time, "[c]lassifying pregnancy within the temporary disability framework . . . represented an effort to extend socioeconomic protection to childbearing workers without discouraging women's employment."[176] After *Gilbert*, skeptical members of Congress and business leaders denounced any effort to provide socioeconomic protection for women, pre-

166. *Id.* at 15–17.
167. *See id.* at 7–9.
168. *See Satty*, 434 U.S. at 143–46.
169. *Id.* at 142.
170. *Id.* (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 139 (1976)).
171. *Id.*
172. *See, e.g.*, Warren Weaver Jr., *Justices, 9-0, Block a Loss of Seniority in Maternity Leave*, N.Y. TIMES, Dec. 7, 1977, at A1, A18.
173. *Id.* at A18 (quoting Statement by Susan Deller Ross, Clinical Director, ACLU).
174. For a study of the temporary disability paradigm, see Dinner, *supra* note 18, at 449–56.
175. *See id.* at 454–55.
176. *Id.* at 455.

senting it as the kind of unfair special accommodation that *Gilbert* rejected.[177] During and after *Satty*, legal feminists responded by reframing the PDA not only as "an effort to extend socioeconomic protection"[178] but also as a guarantee that employers could not impose unique burdens on either women's decision to work or procreate.

G. Business Groups, Pro-Lifers, and Feminists Contest the Benefit-Burden Distinction

The benefit-burden distinction central to *Satty* also shaped debate about the PDA in 1977. Testifying on behalf of the Chamber of Commerce, Brockwell Heylin insisted that the issue was whether Congress was willing to provide special benefits to pregnant women that other workers could never enjoy.[179] Testimony highlighted statistics suggesting that only 40%–50% of pregnant workers returned to work after maternity leave,[180] while "almost 100% of other workers taking disability leave do return to work."[181] Insofar as pregnancy was sui generis, the PDA would not provide protection against discrimination; it would in fact discriminate against other employees. Heylin reasoned: "The pregnancy disability benefits would become a severance pay which other (non-pregnant) employees cannot receive."[182]

Testimony on behalf of the National Association of Manufacturers (NAM) made more explicit the connection between framing pregnancy as a choice and denouncing the PDA as a form of special treatment.[183] NAM representatives emphasized that men and women chose when they married, chose when they had sexual intercourse, chose when they used contraception, and chose when they turned to abortion.[184] "Within this climate, it is appropriate to ask how much of the economic responsibility for parenthood will be assumed by those men and women who choose to have children" the NAM asked, "and how much responsibility will be [placed on] society . . . ."[185] The central issue was not whether Congress should countenance discrimination but rather "how far society chooses to go in subsidizing parenthood."[186]

As both pro-lifers and legal feminists recognized, the PDA would create some socioeconomic security for pregnant women. Importing special-burden reasoning into the PDA allowed both groups to avoid the charge that they demanded special treatment for women. Instead, sup-

177. *See, e.g.*, *id.* at 431–32.
178. *Id.* at 455.
179. *Discrimination on the Basis of Pregnancy*, *supra* note 145.
180. *Id.* at 101 (Statement on National Association of Manufacturers).
181. *Id.* at 482, 488 (statement of Brockwell Heylin).
182. *Id.* at 482.
183. *See id.* at 95–97 (statement of the National Association of Manufacturers).
184. *See id.* at 96.
185. *Id.*
186. *Id.*

porters of the PDA contended that the law protected women from unfair and potentially unconstitutional burdens on their reproductive decision-making that men never faced.

Moreover, meaningful-choice reasoning allowed pro-life activists to present their movement as reasonable, moderate, and willing to advance real reproductive choice—a major goal of ACCL leaders.[187] Lobbying for meaningful choice showed that some pro-lifers could work in broad legislative coalitions, advancing interests (beyond abortion bans) that other Americans held dear.[188]

More broadly, pro-lifers seized on pregnancy discrimination as an issue, hoping to "promote[] motherhood."[189] Some movement members believed that poor women terminated their pregnancies in order to preserve their livelihood.[190] Protecting women against pregnancy discrimination would ensure that more women could afford to bring their pregnancies to term. Pro-life activist and obstetrician-gynecologist Andre Hellegers told Congress that the PDA would deter coercive abortions.[191] "Let's call it a pro-choice bill," Hellegers quipped, "in which . . . the choice, if it goes in any direction, is going to go in the childbirth way."[192]

Other pro-life witnesses developed a more comprehensive vision of meaningful-choice reasoning. Jacqueline Nolan-Haley of the ACCL attacked *Gilbert* as a "dangerous precedent with respect to the exercise of fundamental rights."[193] Nolan-Haley identified four rights at stake in pregnancy discrimination: "The decision to procreate, the decision not to terminate a pregnancy, the decision to prevent [pregnancy] through contraception, and the decision to terminate a pregnancy."[194] According to Nolan-Haley, *Gilbert* unjustly—and perhaps unconstitutionally—"penalized women who chose to exercise the first two rights to the exclusion of the latter."[195]

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187. The ACCL, for example, stressed the need to create "a reasonable, rational, national pro-life organization" in order to attract the support of those "unable to identify themselves with the [current] highly polarized organizations." Memorandum from ACCL on Purposes and Objectives of ACCL (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

188. *See, e.g.*, Brochure, Am. Citizens Concerned for Life, No Other Vehicle Quite Like Ours (on file with The American Citizens Concerned for Life Papers in the University of Michigan Gerald Ford Memorial Library).

189. Thea Rossi Barron, *Insurance Bill Includes Pregnancy Clause*, NAT. RIGHT TO LIFE NEWS, Feb. 1978, at 8.

190. *See* ZIEGLER, *supra* note 72, at 193–201.

191. *See Discrimination on the Basis of Pregnancy*, *supra* note 145, at 67–68 (statement of Andre E. Hellegers, Professor, Georgetown University).

192. *Id.* at 68.

193. *Id.* at 437 (statement of Jacqueline M. Nolan-Haley, Special Counsel, Am. Citizens Concerned for Life, Inc.).

194. *Id.* at 432–33.

195. *Id.* at 438.

Legal feminists like Wendy Williams and Letty Cottin-Pogrebin, a feminist author, relied on meaningful-choice reasoning for a quite different reason: 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 upon a woman's choice to bear a child."[196] She reasoned that Congress did not (and should not) intend that any citizen "forgo a fundamental right, such as a woman's right to bear children, as a condition precedent to the enjoyment of . . . employment free from discrimination."[197]

Cottin-Pogrebin articulated the connection between pregnancy discrimination and reproductive choice more forcefully, explaining that women asked for nothing more than protection against burdens society never imposed on men:

> Pregnancy discrimination forces us to choose between brain and uterus; between making money and making babies; between being productive or being 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.[198]

In spite of deep differences about the nature of motherhood and the need for legal abortion, the PDA campaign led pro-lifers and legal feminists to adopt a strikingly similar and transformative understanding of reproductive choice. As Deborah Dinner has shown, legal feminists began highlighting the uniqueness of motherhood in justifying protection from the government.[199] Pro-lifers like Mecklenburg had long emphasized the uniqueness of motherhood in asserting that abortion severed a particularly valuable bond between mother and child, thereby traumatizing any woman who terminated a pregnancy.[200]

Conversely, pro-life activists like Mecklenburg and Czarnecki gravitated toward a definition of meaningful reproductive choice that would prevent discrimination against women who took leave after an abortion as well as a pregnancy. The ACCL's change in position was striking. After all, leaders of the group had endorsed an Article V amendment banning abortion, asserting that the Constitution did not recognize rights for women "to choose to destroy their unborn children."[201] In the PDA campaign, ACCL leaders argued that they would support the PDA regardless of whether employers had to cover post-abortion leave, because

196. *Id.* at 115 (statement of Wendy W. Williams, Assistant Professor of Law, Georgetown University).

197. *Id.*

198. *Id.* at 451–52 (statement of Letty Cottin-Pogrebin, Editor for *Ms.* magazine).

199. *See* Dinner, *supra* note 154, at 499–500.

200. Mecklenburg, for example, called for post-abortion counseling to address women's regret and to prevent "recidivism." *School-Age Mother and Child Act*, *supra* note 140, at 504–06.

201. *Id.* at 498.

the law "would encourage a woman to keep a pregnancy or do what she wants. It gives women a choice."[202] If anything, the ACCL favored a version of the PDA that did not exclude post-abortion treatment, since some within the organization believed that the law would garner more support if no abortion exclusion applied.[203] As an ACCL leader explained: "ACCL supports H.R. 6075 [the PDA] as a pro-life bill with or without an abortion amendment and urges its prompt passage."[204]

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—one that required affirmative support for women seeking to procreate or avoid procreation.[205]

More importantly, this understanding of meaningful choice influenced many of the key supporters of the PDA. Key sponsors of the PDA across the ideological spectrum echoed this idea of reproductive choice. Senator Thomas Eagleton (D-MO) argued that sex discrimination could effectively coerce women into terminating a pregnancy:

> [T]here are a number of reasons why a woman would want to have an abortion. One of the reasons is that she cannot afford the expenses attendant to a prolonged pregnancy and childbirth. . . . We are removing that [situation] where the price tag of a baby determines whether it is born or not.[206]

Representative Ronald Sarasin (R-CT) similarly argued that women with real reproductive choice would be better able to participate in the economic and social life of the nation.[207] The PDA gave a woman "the right to choose both, to be financially and legally protected before, during, and after her pregnancy."[208] According to a Democratic supporter of the bill, the PDA would "put an end to an unrealistic and unfair system that forces women to choose between family and career."[209]

Those on opposing sides of the abortion issue understood meaningful reproductive choice in varying ways and described it differently over time. In the early-to-mid-1970s, feminist litigators first used the idea to

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202. *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy Part 2: Hearing on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the H. Comm. on Education and Labor*, 95th Cong. 66 (1977) (statement of Dorothy Czarnecki).

203. *See id.* at 63–66; *see also* ZIEGLER, *supra* note 72, at 197–99.

204. Letter from Marjory Mecklenburg, President of American Citizens Concerned for Life to Pro-Life Leaders and News Media Representatives (on file with author).

205. *School-Age Mother and Child Act*, *supra* note 140, at 501 (quoting National Council of Churches Study Paper (Mar. 2, 1972)).

206. *Legislative History of the Pregnancy Discrimination Act of 1978, Committee on Labor and Human Resources*, 96th Cong. 115–16 (1980) [hereinafter *Legislative History of the PDA*] (statement of Sen. Thomas F. Eagleton).

207. *See id.* at 208–09 (statement of Rep. Ronald Sarasin).

208. *Id.* at 208.

209. *Id.* at 185 (statement of Paul E.Tsongas, Massachusetts).

demand both abortion rights and freedom from sex discrimination. These attorneys framed meaningful choice as a justification for heightened judicial scrutiny. Feminist litigators also used meaningful choice to expose understudied connections between equality and liberty for women.

Forced to negotiate in the legislative arena, in the mid-1970s, feminists redefined meaningful choice, playing up connections between poverty, sex equality, and the costs of reproduction. In responding to business lobbyists, feminists also emphasized the language of benefits and burdens to counter accusations that pregnant women were seeking special treatment.

In the mid-1970s, feminists' troubled partnership with pro-lifers also transformed arguments about meaningful choice. Pro-life advocates understood meaningful choice in different terms than did feminists, obscuring any connection between abortion, equality, and liberty. Whereas many feminists saw protective legislation as a reflection of damaging sex stereotypes, these antiabortion activists also viewed women as vulnerable and deserving of protection. Over time, however, some pro-lifers developed a fuller account of why women were vulnerable—one that focused heavily on sex stereotyping and discrimination. By the later 1970s, some pro-lifers found more common ground with feminists, favoring the PDA even if it did not prohibit abortion coverage.

The idea of meaningful reproductive choice underlying the PDA had radical implications. Women in favor of and opposed to abortion brought to the surface often-ignored connections between liberty and equality, presenting protection from sex discrimination as a necessary precondition for any true exercise of reproductive liberty. Both feminists and pro-lifers defined choice as much more than freedom from state interference. Indeed, calling for meaningful reproductive choice allowed activists on either side of the abortion question to navigate difficult questions about "special treatment" and "reverse discrimination" plaguing the civil rights movement and the women's movement in the late 1970s.[210] By presenting private acts of discrimination—and even poverty—as impermissible burdens on a woman's reproductive liberty, opposing activists found a powerful new way of demanding economic security for working women.

Superficially, this understanding of meaningful choice seems consistent with the position taken by most federal courts that employers can satisfy the PDA by creating pregnancy-blind disability policies.[211] Legal

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210. On the politics of reverse discrimination in the period, see TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 135–57 (2004); NICHOLAS LAHAM, THE REAGAN PRESIDENCY AND THE POLITICS OF RACE: IN PURSUIT OF COLORBLIND JUSTICE AND LIMITED GOVERNMENT 20–25 (1998).

211. For a sample of court decisions on pregnancy blindness, see *supra* note 2 and accompanying text.

feminists, pro-life activists, and legislators sympathetic to either group generally rejected the idea that the PDA created special benefits for pregnant women. However, the history of arguments for meaningful reproductive choice revealed a more complex legislative purpose underlying the PDA. Meaningful-choice arguments forced Congress to evaluate pregnant women based on their ability to work rather than the "cause" of their disability. By penalizing pregnant women for the cause of their disability, employers would impose burdens on women's reproductive decision-making that other workers completely avoided. Pregnancy-blind policies impose precisely the kind of harsh burden the framers of the PDA—and activists on both sides of the abortion question—sought to prevent.

Why did meaningful reproductive choice arguments fade from view in the aftermath of the PDA battle? Part II argues that these contentions lost influence not because of any inherent flaw but because of changes to the larger political landscape.

II. THE DECLINE OF MEANINGFUL REPRODUCTIVE CHOICE

Since the 1980s, both antiabortion leaders and feminist commentators have pointed out fundamental flaws in the use of choice as a framework for reproductive liberty. Before and after her nomination to the Supreme Court, Ruth Bader Ginsburg described the privacy rationale for abortion rights as unconvincing, reasoning that the Court might have rendered the abortion conflict less intense had it grounded abortion rights in the Equal Protection Clause.[212] Commentators have pointed out that a privacy rationale laid the foundation for later Supreme Court decisions upholding bans on abortion funding.[213] Historian Rickie Solinger has argued that a choice framework ratified existing race and class divisions governing access to reproductive healthcare.[214]

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212. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198–99, 1208 (1992) ("[*Roe*] halted a political process that was moving in a reform direction and thereby . . . prolonged divisiveness and deferred stable settlement of the issue").

213. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 930 (1973) (arguing that outlawing abortion is not about "governmental snooping" into citizens' private lives); 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."); 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); Law, *supra* note 26, at 1020 ("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 dic[h]otomy that is at the heart of the structures that perpetuate the powerlessness of women."); Catharine MacKinnon, Roe v. Wade*: A Study in Male Ideology, in* ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 52–53 (Jay L. Garfield & Patricia Hennessey eds., 1984) (criticizing *Roe*'s emphasis on choice and privacy instead of equality).

214. *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).

This Part contends that choice arguments lost influence in the abortion debate not because of any of the flaws identified by feminist commentators but rather because of a rapidly changing political reality. First, pro-life arguments for meaningful choice came into growing tension with the campaign to preserve bans on abortion funding. In the context of funding bans, antiabortion activists, including those like Mecklenburg, came to argue that rights to choose guaranteed only freedom from state interference. Increasingly, the abortion funding issue divided the coalition that had successfully pushed the PDA.

Moreover, as the Part shows next, coalition politics undermined meaningful-choice reasoning. With the emergence of the New Right and Religious Right, antiabortion activists allied with partners who rejected both a strong antidiscrimination policy and a broadening of the social welfare net. The 1980 election of Ronald Reagan and a slate of pro-life Republicans reinforced antiabortion activists' dependence on allies opposed to the central premises of meaningful-choice reasoning.

Finally, as the Part shows, facing setbacks in the Supreme Court, Congress, the academy, and state legislatures, feminists began searching for a more constitutionally sound and popularly resonant justification for abortion rights. As progressives developed what many saw as sounder defenses of abortion rights, academics and grassroots activists lost sight of the transformative understandings of choice used in the PDA campaign.

A. The Abortion Funding Battle Divides Supporters of Meaningful Reproductive Choice

In the mid-1970s, as the battle for bans on publicly funded abortion picked up pace, pro-life legislators and grassroots activists deployed two key arguments involving a right to choose. First, some activists and politicians charged that taxpayers had a right to conscientiously object to the funding of what they saw as the "murder [of] the unborn."[215] To some extent, Representative Henry Hyde (R-IL), the sponsor of an ultimately successful funding ban, described both poverty and abortion as acute social injustices:

> "Let the poor women of America make a list of those things that society denies them and which are enjoyed by rich women" . . . "Decent housing, decent education, . . . decent income, and then say to them, 'Now [sic] those will take second place. But we will encourage you to kill your . . . children."[216]

Hyde also insisted that poor women had no right to government assistance of any kind. While admitting that he would ban all abortions if

215. *Abortions: Should Taxpayers Foot the Bill?*, DESERET NEWS, Sept. 29, 1976, at 3A.
216. *Id.* (quoting Statement by Rep. Henry J. Hyde).

he could, Hyde emphasized that the right to choose recognized in *Roe* in no way required the State to pay for abortion.[217] In the Supreme Court, attorneys representing Americans United for Life Legal Defense and Education Fund similarly explained: "If the abortion decision is so private . . . it follows that government should not itself be compelled to respond to the demand of the exercise of that private right . . . ."[218] Under *Roe*, the state could not interfere with a woman's decision-making but had no obligation to fund abortion.[219]

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.[220] Almost as soon as it passed, the Hyde Amendment sparked intense conflict about exceptions for rape, incest, and health.[221] Locked in a constant struggle to preserve funding bans, pro-lifers like Marjory Mecklenburg retreated from their earlier positions on meaningful choice.[222] In pushing the PDA, Mecklenburg and the ACCL had defended an idea of choice that required protection against sex discrimination, going so far as to support a bill that required employers to give women post-abortion leave.[223] By 1978, Mecklenburg again joined Planned Parenthood in lobbying for an ultimately successful bill, the Adolescent Health, Services, and Pregnancy Care Act of 1978, requiring state support for both family planning and for adolescents seeking to bear and raise children.[224] This time, however, Mecklenburg argued that women's right to meaningful choice did not extend to abortion access. "'Freedom to choose' implies that it is equally possible for a woman to choose to give birth as well as to abort," Mecklenburg argued.[225] "Today frightened, confused and dependent adolescents often have little freedom to continue a pregnancy unless the kind of

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217. *See* CAROL A. EMMENS, THE ABORTION CONTROVERSY 68–69 (rev. ed. 1991).

218. Motion and Brief Amicus Curiae of Americans United for Life, Inc. in Support of Petitioner John H. Poelker at 13, Poelker v. Doe, 432 U.S. 519 (1977) (No. 75-442).

219. *See id.* at 12–13.

220. For the Supreme Court's decisions on the public funding of abortion, see *Maher v. Roe*, 432 U.S. 464, 470–78 (1977) (upholding a Connecticut Medicaid funding ban on abortion); *Poelker v. Doe*, 432 U.S. 519, 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).

221. Karen De Witt, *Foes of Abortion Seek to Tighten Restrictions on Medicaid Funds*, N.Y. TIMES, at B20 (Mar. 1, 1979), http://0-search.proquest.com.bianca.penlib.du.edu/docview/120940075/C6EB024E86C94119PQ/1?accountid=14608; Martin Tolchin, *Financing Bill and Abortion: Both Sides Emphasize Questions of Conscience*, N.Y. TIMES, at A19 (Oct. 2, 1980), http://0-search.proquest.com.bianca.penlib.du.edu/docview/121031543/752E5F0422104BBEPQ/1?accountid=14608; Martin Tolchin, *On Abortion, the Houses Still Remain Miles Apart*, N.Y. TIMES, Nov. 27, 1977, at 176.

222. *See* ZIEGLER, *supra* note 72, at 200.

223. *See id.* at 197–99.

224. *Adolescent Health, Services, and Pregnancy Prevention and Care Act of 1978: Hearings on S. 2910 Before the Comm. on Human Resources*, 95th Cong. 433–34 (1978) (statement of Marjory Mecklenburg).

225. *Id.* at 434.

services this bill details are readily available."[226] When addressing the scope of reproductive freedom, however, Mecklenburg concluded that meaningful choice should not include abortion.[227] Reversing an earlier position, she maintained that the public would not support a meaningful-choice law if it included abortion services. "If abortion is interjected in this bill," argued Mecklenburg, "I believe it will reduce or eliminate its chances of passage . . . ."[228]

B. Political Party Realignment Undercuts Support for Meaningful Choice

Before the late 1970s, both the antiabortion and abortion-rights movements appealed to politicians and activists across the ideological spectrum. By the late 1970s, pro-life positions had become a calling card of grassroots conservatism.[229] The mobilization of organizations identifying with the New Right and Religious Right, members of which opposed abortion, represented a potent new source of allies and political influence for pro-life leaders.[230] Organizations like the Moral Majority and Christian Voice provided much-needed financial support and political connections for a struggling pro-life movement.[231] Political operatives frustrated with the mainstream Republican Party, including Paul Weyrich and Richard Viguerie, united fragmented single-issue groups, forging a powerful social-conservative coalition.[232] By backing Ronald Reagan and other Republican candidates who endorsed antiabortion positions, pro-lifers bid for unprecedented political influence.[233] Even though many antiabortion voters had long supported the Democratic Party and contin-

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226. *Id.*

227. *See id.* at 431.

228. *Id.*

229. On the growing relationship between the Democratic Party and the women's movement in the 1970s and 1980s, see, for example, KIRA SANBONMATSU, DEMOCRATS, REPUBLICANS, AND THE POLITICS OF WOMEN'S PLACE 64 (2002); LISA YOUNG, FEMINISTS AND PARTY POLITICS 10, 32 (2000).

230. *See generally* Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After* Roe v. Wade, *1973-1980*, 87 CHI.-KENT L. REV. 571 (2012).

231. On the emerging alliance between the New Right and Religious Right, see, for example, DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 165–74 (2010) ("As New Right political operatives looked for controversial issues to highlight in their campaigns against congressional liberals, they turned with increasing frequency to the subject of abortion."); Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2060–65 (2011).

232. On the formation of this coalition, see, for example, Reva B. Siegel & Linda Greenhouse, *Afterword*, *in* BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 259–60 (Reva B. Siegel & Linda Greenhouse eds., 2010).

233. On the importance of Reagan and Republican support to pro-lifers in the period, see, for example, DONALD T. CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 148–97 (2007); Cassidy, *supra* note 90, at 146–48.

ued to do so well into the 1980s, pro-lifers had more reason than ever to forge a partnership with the Religious Right and the Republican Party.[234]

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.[235] "Reaganomics" translated these ideas into an overarching economic philosophy.[236] When it came to welfare, Reagan worked with the New Right to reframe dependency as a vice rather than a source of vulnerability.[237] New Right politics promised to shrink the social safety net activists like Mecklenburg had promoted as a precondition for true reproductive choice.

Whereas pro-lifers had long demanded equal treatment for all dependent Americans, Reagan described dependency as dangerous. In a 1981 speech, Reagan related the story of a victim of the welfare state—a young woman who "had become so dependent on the welfare check that she even turned down offers of marriage."[238] Reagan's story echoed statements made by the New Right connecting the welfare state and the decline of the traditional family. A healthy dose of economic self-sufficiency, Reagan suggested, would save the family and revive an ailing economy.[239] More importantly, "ideas previously seen as distinctly conservative had become mainstream."[240] Abortion opponents joined a political coalition committed to dismantling the welfare state. American voters appeared increasingly hostile to the idea that welfare counted as a right for children or anyone else. In this environment, meaningful-choice arguments lost momentum.

Reagan's Justice Department also scaled back on antidiscrimination protections, particularly when those policies required affirmative action.[241] While continuing to enforce an existing affirmative-action executive order, Reagan Administration officials filed suit seeking to overturn

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234. On the continued loyalty of some pro-life voters toward the Democratic Party into the 1980s, see, for example, DAVID KAROL, PARTY POSITION CHANGE IN AMERICAN POLITICS: COALITION MANAGEMENT 67 (2009).

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

236. REBECCA DOLHINOW, A JUMBLE OF NEEDS: WOMEN'S ACTIVISM AND NEOLIBERALISM IN THE COLONIAS OF THE SOUTHWEST 14 (2010).

237. MARISA CHAPPELL, THE WAR ON WELFARE: FAMILY, POVERTY, AND POLITICS IN MODERN AMERICA 199 (2010).

238. *Id.* (quoting Statements by President Ronald Reagan (1981)).

239. *See* Adam Clymer, *Reagan Urges Party to Support Tax Cuts*, N.Y. TIMES, at 27 (June 25, 1978), http://0-search.proquest.com.bianca.penlib.du.edu/docview/123657465/76E71B388C414A49PQ/1?accountid=14608.

240. DANIEL BÉLAND & ALEX WADDAN, THE POLITICS OF POLICY CHANGE: WELFARE, MEDICARE, AND SOCIAL SECURITY REFORM IN THE UNITED STATES 44 (2012).

241. On the Reagan Administration's opposition to affirmative action, see ANDERSON, *supra* note 210, at 162–85.

quotas in some fifty affirmative-action decrees.[242] Ideologically, administration officials developed a stinging criticism of "special treatment."[243] In 1987, in *California Federal Savings and Loan Ass'n. v. Guerra*,[244] the Reagan Administration crystallized its position. *Guerra* asked whether Title VII preempted any state law requiring employers to provide certain benefits to pregnant workers.[245] In arguing against the California policy, the Reagan Administration described laws mandating accommodations for pregnancy as the kind of "reverse discrimination" that Title VII prohibited and that the administration opposed.[246] The pro-life movement's allies in the New Right and Religious Right strongly opposed affirmative action.[247]

Arguments for meaningful choice no longer made sense to a pro-life movement working so closely with opponents of gender-based affirmative action. When antiabortion activists like Marjory Mecklenburg defended reproductive choice, they demanded protection for pregnant women and mothers—those they saw as members of a particularly vulnerable and dependent class.[248] New Right activists responded that since women already enjoyed special privileges, antidiscrimination protections represented a step down, a threat to "conventional culture, established institutions, and customary social roles."[249] When the antiabortion movement partnered with the political right, prior commitments to the expansion of antidiscrimination law seemed profoundly out of step.

C. Feminists Seek Better Justifications for Abortion Rights

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 claims relying on the Equal Protection Clause of the Fourteenth Amendment. Starting in 1973, legal academics from across the ideological spectrum attacked the constitu-

242. On the retention of the affirmative-action executive order, see HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 173 (2002). On the effort to eliminate racial quotas from consent decrees, see ANDREW E. BUSCH, RONALD REAGAN AND THE POLITICS OF FREEDOM 27 (2001).

243. *See* ANDERSON, *supra* note 210, at 184.

244. 479 U.S. 272 (1987). *Guerra* ultimately held that the California law did not violate Title VII. *Id.* at 280.

245. *Id.* at 277–80.

246. RICHARD L. PACELLE, JR., BETWEEN LAW AND POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 149, 240–41 (2003).

247. *See, e.g.*, JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM 83 (1990); LAURA KALMAN, RIGHT STAR RISING: A NEW POLITICS, 1974–1980, at 189, 191–92 (2010).

248. *See* ZIEGLER, *supra* note 72, at 197–99.

249. DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE 214 (2005).

tional underpinnings of the *Roe* decision.[250] Starting with John Hart Ely's *The Wages of Crying Wolf*, legal academics presented the substantive due process reasoning of *Roe* as unconvincing, intellectually underwhelming, and even results-oriented.[251] By the early 1980s, academic attacks on *Roe* prompted a powerful response from legal 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.[252] As legal feminists worked to develop a better explanation for abortion rights, the transformative uses of choice that appeared in the 1970s faded from view.[253]

At least in the 1970s, however, the framers of the PDA (and a variety of laws guaranteeing protections for low-income mothers) advanced an idea of reproductive choice dramatically at odds with the narrow understanding now linked to the *Roe* decision. The framers of the PDA emphasized this idea of meaningful choice, presenting antidiscrimination law as a crucial protection against reproductive coercion.

Placing the PDA in a broader historical context spotlights the shortcomings of current judicial interpretations of the law. Courts have generally interpreted the PDA to include three interrelated rights: the right to an individualized judgment of capacity, the right to work if not incapacitated, and the right to whatever accommodations an employer offers workers who have the same physical capacity to work.[254] By contrast, women have fared poorly when seeking light-duty work or some other modification that would allow them to work throughout pregnancy.[255] As Joanna Grossman has argued, "The failure of current law to acknowledge a pregnant woman's right to work despite temporary, partial impairments or risks systematically undermines the ability of women to attain workplace equality."[256] As the history of struggles for meaningful choice

250. *See* Jack M. Balkin, Roe v. Wade*: An Engine of Controversy*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 3, 21 (Jack M. Balkin ed., 2005).

251. *See, e.g.*, Ely, *supra* note 213, at 940 (arguing that *Roe* had revived a discredited and dangerous substantive due process doctrine). For further exploration of criticisms of *Roe* in the period, see GARROW, *supra* note 40, at 609–17 (surveying critical responses to the *Roe* decision).

252. *See, e.g.*, Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 143–44 (2001); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 821 (1983).

253. Some scholars maintained that privacy or liberty, although not in the form envisioned by the *Roe* Court, represented the most promising foundation for abortion rights. *See, e.g.*, Anita Allen, *Allen, J., Concurring in the Judgment*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 250, at 92, 98–107; Jed Rubenfeld, *Rubenfeld, J., Concurring in* Roe v. Wade *and Concluding that the Writ of Certiorari Should be Dismissed as Improvidently Granted in* Doe v. Bolton, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID, *supra* note 250, at 109, 118–19.

254. *See* Grossman, *supra* note 18, at 607–13.

255. *See id.* at 570 ("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.").

256. *Id.* at 621. Part I, *supra*, discusses this literature at greater length.

makes apparent, that same failure undermines the idea of reproductive liberty written into the PDA.

Part III examines how—and how much—*Young* transformed pregnancy-discrimination jurisprudence. While the Court removed some of the barriers in the way of individual disparate treatment claims, employers can still impose the kind of burdens on reproductive decision-making that the PDA was designed to rule out.

III. *YOUNG*, ACCOMMODATION, AND MEANINGFUL REPRODUCTIVE CHOICE

The theory of meaningful choice developed by abortion opponents and legal feminists stands in obvious tension with decisions interpreting the PDA to require only what the courts call "pregnancy blindness." Where does the Supreme Court's decision in *Young* leave pregnancy-blind policies and meaningful choice more broadly? After briefly laying out the theory of meaningful reproductive choice underlying the PDA, this Part begins by examining pre-*Young* analysis of light-work and other accommodation requests. Next, the Part explores what *Young* did and did not change about the judicial treatment of pregnancy-blind policies. Finally, in the aftermath of *Young*, the Part considers the best strategy for advancing the norm of meaningful choice that feminists and antiabortion activists embraced.

A. The Legislative Constitutional Norm of Meaningful Choice

The story of the PDA underlying the *Young* litigation spotlights the importance of what Reva Siegel and Robert Post have called legislative constitutionalism,[257] a process that "delivered what even a more generous American [juridical] Constitutionalism could not: affirmative rights applicable to private as well as public workplaces."[258] Often, scholars describe the rights created by the PDA as formal-equality protections, that is, guarantees that pregnant women enjoy protection from stereotyping and rights to access the benefits employers provide to similarly disabled employees.[259] Understanding the role of meaningful-choice reasoning reveals a more radical purpose advanced by the framers of the PDA and their supporters.

It is worth explaining why an idea of choice thoroughly rejected by the Court gained currency in Congress. While some constitutional rights require particular remedies or entailments, others "function as values that

257. *See generally* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

258. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 33 (2010).

259. *See, e.g.*, Grossman, *supra* note 18, at 570; Issacharoff & Rosenblum, *supra* note 18, at 2204 (describing the PDA as adopting a "formal equality model").

courts seek to realize, rather than as principles that mandate specific remedial entailments."[260] Siegel and Post offer the example of judicially ordered school desegregation orders.[261] Although these orders may not be specifically required by the Equal Protection Clause, they count as a crucial attempt to give it meaning.[262] The guarantee of meaningful choice recognized in the PDA operates in a similar way. While the Court has made clear that the Constitution protects a woman's freedom to make certain reproductive decisions, the Court has found that the Fourteenth Amendment requires no specific remedial steps to vindicate that right.[263] Through the PDA, Congress attempted to work out the meaning of constitutional reproductive choice from the "distinct standpoint of [the] legislature."[264] The story of the PDA makes clear important differences between legislative constitutionalism and the work of the courts and between the reproductive-liberty principles each embraced.

Legislative constitutionalism differs from judicial decision-making in ways that mattered to the recognition of meaningful reproductive choice. Because of the case-or-controversy requirement, judicial decisions address only those constitutional questions at stake in the litigation.[265] By contrast, Congress can take on larger issues, writing into statutes a more robust vision of what constitutional rights could mean.[266] In particular, Congress can test the distinction between positive and negative rights, creating redistributive remedies.[267] Congress effectively experiments with such capacious notions of rights and remedies partly because it can act more cautiously in articulating its constitutional commitments. Legislative constitutionalism can unfold incrementally, setting forth a principle and developing a remedial scheme over time.[268] Crucially, Congress is also democratically accountable, and voters can respond to any perceived misstep in the articulation of important constitutional commitments.[269]

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260. Post & Siegel, *supra* note 257, at 2006.

261. *Id.* at 2006–07.

262. *See* id.

263. If anything, the Court's recent jurisprudence focuses on the permissible burdens states can place on abortion rights. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue.").

264. Post & Siegel, *supra* note 257, at 2007.

265. *Id.* at 2006.

266. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 167 (2001) ("Congress's 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.").

267. *See* ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 314–15 (1994); Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 NW. U. L. REV. 410, 420–22 (1993).

268. Post & Siegel, *supra* note 257, at 2006–07.

269. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 182–83 (1999) ("[I]ts constitutional tasks of debate, discussion, and authorization inevitably make Congress a more deliberative [and] public . . . body.").

Key features of legislative constitutionalism made it much more effective for those arguing for meaningful reproductive choice. Courts may have neither the competence nor the will to fashion redistributive remedies of the kind demanded by some proponents of reproductive choice.[270] Judicial precedents establishing a strong tradition of negative constitutionalism do not bind Congress as they do the Court.[271] A Congress accountable to the people felt freer to experiment with different ideas of reproductive choice.

The PDA modified the reasoning underlying meaningful-choice arguments. As its legislative history makes plain, framers of the PDA set out not only to guarantee women individualized treatment but also to "put an end to an unrealistic and unfair system that forces women to choose between family and career."[272] The framers of the PDA described as coercive disability policies that penalized women for taking pregnancy-related leave.[273] As the PDA's sponsors framed it, these penalties burdened an unquestionably constitutional right—a right for women "to continu[e] their pregnancy and maintain[] their jobs at the same time."[274] While the courts may not view such policies as unconstitutional, Congress concluded that pregnancy discrimination created an impermissible burden on women's reproductive choice.[275]

Just the same, in passing the 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."[276] 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."[277]

Although incomplete, the PDA's original guarantee of meaningful choice stands in obvious tension with current judicial interpretations of the law. The federal courts interpret the PDA to require "pregnancy-

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270. Post & Siegel, *supra* note 257, at 2007 (highlighting "problems of redistribution that would be quite beyond the bounds of judicial remedies").

271. Just the same as Gordon Silverstein has argued, judicial decisions shape Congress's engagement with constitutional issues in unpredictable ways. *See* GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 35–41, 63–67 (2009).

272. *Legislative History of the PDA*, *supra* note 206, at 185 (statement of Paul E. Tsongas).

273. *Id.* at 203 (statement of Sen. J. Javits).

274. *Id.* at 202–03 (statement of Sen. J. Javits).

275. *See id.* at 208–09 (statement of Rep. Ronald A. Sarasin); *id.* at 178 (statement of Rep. Baltasar Corrada); *id.* at 125–27 (statement of Sen. Biden); *id.* at 208 (statement of Rep. James M. Jeffords).

276. H.R. REP. NO. 95-948, at 5 (1978).

277. *Id.* at 4.

blind[ness]."[278] That is, a policy passes muster as long as it "does not grant or deny light work on the basis of pregnancy, childbirth, or related medical conditions."[279] Viewed in pure formal-equality terms, pregnancy-blind policies seem valid, since such policies do not appear to single out pregnancy, at least superficially. Understood in the context of the liberty norms at work in the PDA, however, pregnancy-blind policies create just the kind of special burden on women's reproductive decision-making that the PDA attempts to rule out.

The Fifth Circuit first clearly articulated the pregnancy-blindness defense in 1998, in *Urbano v. Continental Airlines, Inc.*[280] Mirtha Urbano, a Continental employee, mostly worked as a ticket agent.[281] While she performed a number of tasks, Urbano sometimes had to perform physical tasks, such as lifting customers' luggage.[282] After learning she was pregnant, Urbano began experiencing lower back pain and visited her physician.[283] Because she had not been injured on the job, Continental found Urbano ineligible for a light-work assignment, forcing her to exhaust her family leave and go without pay.[284] Urbano brought suit under Title VII.[285]

Several years earlier, the Sixth Circuit found that a similar light-duty policy violated the PDA, since the law expressly required "that employers provide the same treatment of such individuals as provided for 'other persons . . . similar in their ability or inability to work.'"[286] The *Urbano* Court disagreed.[287] The formal terms of the employer's policy, not its substantive effect, dictated the court's analysis.[288] Unless Urbano could show that Continental's policy was a "pretext for discrimination against pregnant women or that it had a disparate impact on them," the policy satisfied Title VII.[289] The Fifth Circuit suggested that Title VII might mandate pregnancy blindness since a contrary "policy would treat a male employee 'in a manner which but for that person's sex would be different.'"[290]

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278. *See* Widiss, *supra* note 18, at 964, 1022.

279. Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

280. 138 F.3d 204, 206–08 (5th Cir. 1998), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

281. *Id.* at 205.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (quoting 42 U.S.C. § 2000e(k) (2012)).

287. *Urbano*, 138 F.3d at 207–08.

288. *See id.*

289. *See id.*

290. *Id.* at 208 n.2 (quoting Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 683 (1983)).

The Fourth Circuit's decision in *Young* elaborated on the justification for pregnancy blindness under the PDA. Peggy Young began working for UPS in 1999, and by 2002, she had secured a position driving a delivery truck.[291] By 2006, Young had shifted to a part-time position as an air driver, working in the early morning and picking up packages delivered by air carrier the night before.[292] In July 2006, after two rounds of unsuccessful in vitro fertilization, Young received leave from her employer to try a third time.[293] When she finally became pregnant, several doctors told her not to lift more than twenty pounds for the first twenty weeks of her pregnancy.[294] Armed with her doctors' advice, Young requested a light-work accommodation.[295]

As a matter of official policy, UPS's applicable Collective Bargaining Agreement allowed accommodation only when workers were injured on the job or when employees had a disability cognizable under the ADA.[296] UPS's occupational health specialist, Cynthia Martin, concluded that Young's pregnancy did not warrant ADA protection and had not occurred on the job, and as a result, Martin denied Young's request.[297] In November, when refused again by UPS's Capitol Division Manager, Young had to exhaust her leave under the Family Medical Leave Act.[298] Between November 2006 and 2007, Young received no pay and eventually lost her medical coverage. [299] After April 2007, when she gave birth, she returned to work, filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).[300] Young alleged race and sex discrimination under Title VII, as well as disability discrimination under the ADA.[301]

In rejecting Young's claim, the Fourth Circuit zeroed in on the second clause of the PDA, which provides, "women affected by pregnancy . . . shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[302] While acknowledging that the second clause of the PDA seemed clear on its face, the Fourth Circuit tried to reconcile it with the first clause.[303] "Although the second clause can be read broadly," the court explained, "we conclude that its placement in the definitional sec-

291. Young v. United Parcel Serv., Inc. (*Young I*), 707 F.3d 437, 440 (4th Cir. 2013), *amended and superseded by* Young v. United Parcel Serv., Inc., 784 F.3d 192, *subsequent determination*, 2015 WL 2058940 (2015).
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 440–41.
296. *Id.* at 439–40.
297. *Id.* at 440–41.
298. *Id.* at 441.
299. *Id.*
300. *Id.* at 442.
301. *Id.*
302. *Id.* at 447–48 (quoting 42 U.S.C. § 2000e(k) (2012)).
303. *See id.* at 447–49.

tion of Title VII, and grounding within the confines of sex discrimination under § 703, make clear that it does not create a distinct and independent cause of action."[304] To do otherwise, as the court reasoned, would make pregnant workers a favored class, receiving special treatment other employees did not receive.[305]

The same reasoning informed the court's analysis of Young's *McDonnell-Douglas* claim. "Under this framework, Young must establish a prima facie case of sex discrimination on her pregnancy claim by showing '(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more favorable treatment.'"[306]

The court focused on the fourth element—particularly, who counted as an appropriate comparator.[307] Young urged the court to compare her to other workers similarly able to perform certain on-the-job tasks.[308] By contrast, UPS primarily analyzed the source of different workers' disability.[309] As the court explained, "Young is not similar to employees injured on the job because, quite simply, her inability to work does not arise from an on-the-job injury."[310] Finding that Young had not presented enough evidence of circumstances "giving rise to an inference of unlawful discrimination," the court rejected her PDA claim.[311]

B. Pregnancy Blindness After Young

In vacating the Fourth Circuit's decision in *Young*, the Supreme Court tried to carve out a middle-ground position that differed from the stands taken by both UPS and the Fourth Circuit on the one hand and Peggy Young on the other.[312] The dispute turned on the meaning of the second clause of the PDA, which states that pregnant workers shall be treated the same "as other persons not so affected but similar in their ability or inability to work."[313] Young argued that "[t]he PDA . . . seeks to ensure that 'women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job.'"[314] In Young's reading, the second clause did not require courts to set aside a conventional disparate-treatment analysis but did mandate that judges identifying a discriminatory intent compare pregnant workers to

304. *Id.* at 447.
305. *Id.* at 448.
306. *Id.* at 449–50 (quoting Gerner v. Cty. of Chesterfield, 674 F.3d 264, 266 (4th Cir. 2012)).
307. *See id.* at 450–51.
308. *See id.* at 450.
309. *See id.* at 450–51.
310. *Id.*
311. *Id.* at 451 (quoting Mackey v. Shalala, 360 F.3d 463, 468 (4th Cir. 2004)).
312. *See* Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338, 1352–54 (2015).
313. 42 U.S.C. § 2000e(k) (2012); *see also Young II*, 135 S. Ct. at 1352–54.
314. Petitioner's Brief, *supra* note 11, at 19–20 (quoting International Union v. Johnson Controls, Inc., 499 U.S. 187, 204 (1991)).

others with a similar capacity to do a job, regardless of the source of their disability.[315] Amici representing a variety of women's rights and civil rights groups went further, arguing that "[t]he text of the Second Clause leaves no room for a distinction based on the source of the condition to masquerade as a legitimate non-discriminatory reason."[316] By contrast, UPS argued that the second clause simply reaffirmed that pregnant workers counted among the protected classes covered by Title VII and said nothing about whether employers could accommodate some workers while leaving pregnant employees out.[317] In individual disparate-treatment analysis, courts were free to compare pregnant workers to others on the basis of disability.[318] If UPS excluded all employees not injured on the job, the company would necessarily comply with the PDA.[319]

Writing for a 6-3 majority, Justice Breyer found none of these interpretations persuasive. Like the lower courts, the majority found that Young's interpretation would "grant[] pregnant workers a 'most-favored-nation' status."[320] With little analysis of the purpose or history of the PDA, the Court dismissed the idea that Congress would have intended to mandate equal treatment of pregnant workers "irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria."[321] In reaching this result, the majority relied on language in the House and Senate Reports, which stated in pertinent part that the PDA "reestablish[ed] the law as it was understood prior to" the *Gilbert* decision in 1976.[322] Since the Court applied the *McDonnell-Douglas* framework prior to *Gilbert*, the majority concluded that employers could deny pregnant workers accommodations as long as they had "a legitimate, non-discriminatory, nonpretextual reason for doing so."[323]

Nor did the majority find that the text of the PDA required a different interpretation. The second clause compared pregnant workers to "other persons" similarly unable to work.[324] Because the clause did "not say that the employer must treat pregnant employees the 'same' as '*any* other persons' (who are similar in their ability or inability to work),

315. *See id.* at 20–21.
316. Brief of Law Professors and Women's and Civil Rights Organization as Amici Curiae in Support of Petitioner at 24, *Young II*, 135 S. Ct. 1338 [hereinafter Brief for Law Professors] (No. 12-1226).
317. *See* Brief for Respondent, *supra* note 10, at 11–12.
318. *See id.* at 14.
319. *See id.* at 11–12.
320. *Young II*, 135 S. Ct. at 1349.
321. *Id.* at 1349–50.
322. *Id.* at 1350 (quoting S. REP. NO. 95-331, at 8 (1978)).
323. *See id.*
324. *Id.* at 1348.

[or] . . . specify *which* other persons Congress had in mind," the majority found Young's reading unpersuasive.[325]

However, the majority found UPS's interpretation of the second clause equally unconvincing. As Justice Breyer explained, Congress intended to overrule both the holding and reasoning of *Gilbert*.[326] UPS's reading would do nothing to a core premise of the *Gilbert* decision—"that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work."[327]

The *Young* majority further outlined what a worker could do to succeed in an individual disparate-treatment claim.[328] At the prima facie case stage, a worker could prove "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[329] If the employer offered a legitimate, nondiscriminatory reason for the exclusion, a worker could raise an inference of pretext by showing that a policy created "a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden."[330] To show a material issue of fact as to whether a burden exists, a worker could demonstrate that "the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[331]

Concurring in the judgment, Justice Alito analyzed in greater depth to whom pregnant workers could be compared as part of individual disparate-treatment analysis.[332] Alito concluded that "pregnant employees must be compared with employees performing the same or very similar jobs."[333] Alito also offered some clues about how such a comparison would unfold by analyzing one of UPS's accommodations.[334] The company had accommodated drivers who lost their DOT certification.[335] UPS and the Fourth Circuit distinguished pregnant workers from those accommodated on two bases. First, workers who lost DOT certification faced a legal obstacle while pregnant workers did not.[336] Second, workers without DOT certification theoretically still had the ability to perform a variety of physical tasks that pregnant women requiring accommodation

325. *Id.* at 1349–50.
326. *Id.* at 1353.
327. *Id.*
328. *Id.* at 1353–54.
329. *Id.* at 1354.
330. *Id.*
331. *Id.*
332. *See id.* at 1357–59 (Alito, J., concurring).
333. *Id.* at 1357–58.
334. *See id.* at 1360–61.
335. *Id.* at 1360.
336. *See id.*

did not.[337] For Alito, neither of these distinctions made sense.[338] At least on some occasions, workers losing DOT certification would have the same incapacity to work as pregnant employees.[339] UPS offered no explanation as to why pregnant drivers did not receive accommodations afforded to other workers.[340]

Where do pregnancy-blind policies stand in the aftermath of *Young*? This Part next explores the impact of *Young* on three strategies available to pregnant workers: those involving disparate treatment, disparate impact, and disability under the ADA. By providing a partial roadmap for workers challenging pregnancy-blind policies, *Young* will make it easier to bring disparate-treatment claims. At the same time, by reinforcing the idea that providing workers meaningful choice constitutes impermissible "special treatment," *Young* exposes the persistent disadvantages of using litigation to protect pregnant workers.

C. Individual Disparate Treatment Claims

After *Young*, employees will most likely challenge pregnancy-blind policies using either direct or indirect evidence of discrimination. In direct-evidence cases,[341] employees have conventionally (and unsuccessfully) turned to light-work policies themselves as proof of discriminatory intent.[342] The logic here is straightforward: employers use light-work policies that, by their very terms, exclude all pregnant women from accommodations available to employees similarly able (or unable) to work. Prior to *Young*, the circuit courts refuted this logic by relying on a narrow definition of who counts as a proper comparator for pregnant women.[343] In particular, courts compare pregnant women to other workers on the basis of the source of their injury or disability, rather than their capacity to work. On their face, pregnancy-blind policies treat pregnant women the same as all other workers not injured on the job or not considered disabled under the terms of the ADA.

Young is silent on whether pregnancy-blind policies can ever qualify as direct evidence of discrimination, but the logic of the majority opin-

337. *See id.*

338. *See id.* at 1360–61.

339. *See id.*

340. *Id.* at 1361.

341. *See, e.g.*, Jones v. Res-Care, Inc., 613 F.3d 665, 671 (7th Cir. 2010).

342. *See, e.g.*, Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548–49 (7th Cir. 2011), *abrogated by Young II*, 135 S. Ct. 1338; Reeves v. Swift Transp. Co., 446 F.3d 637, 641 (6th Cir. 2006), *abrogated by Young II*, 135 S. Ct. 1338; Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312–13 (11th Cir. 1999), *abrogated by Young II*, 135 S. Ct. 1338; Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998), *abrogated by Young II*, 135 S. Ct. 1338.

343. *See, e.g.*, *Serednyj*, 656 F.3d at 548–49 (upholding a pregnancy-blind policy because it treated pregnant workers the same as non-pregnant employees not injured on the job); *Spivey*, 196 F.3d at 1312–13 (upholding a pregnancy-blind policy because it treated pregnant workers the same as non-pregnant employees not injured on the job); *Urbano*, 138 F.3d at 206 (upholding a pregnancy-blind policy because it treated pregnant workers the same as non-pregnant employees not injured on the job).

ion stands in obvious tension with this argument. The Court explicitly allowed the employer to accommodate some workers with an identical inability to work while excluding pregnant workers so long as employers had a legitimate, nondiscriminatory reason for doing so.[344] Under *Young*, without more, a policy denying accommodation to pregnant workers would likely not constitute direct evidence of discrimination. The fact of the discrimination would not change the analysis. What matters under *Young* is the employer's motivation and intent.[345]

Young will make a greater difference to the courts' analysis under the *McDonnell-Douglas* burden-shifting framework. In the lower courts, the central problem in light-work cases has involved the final element: whether denying light work to pregnant women creates a special burden or whether granting pregnant women light work constitutes special treatment.[346]

Before *Young*, courts answering this question focused on who counts as a relevant comparator—a person "similarly situated" or nearly identical to a pregnant woman whom an employer treats more favorably.[347] Workers ask the court to compare workers in terms of their ability to do a job, while employers ask the courts to spotlight the cause of a worker's disability.[348] Again, for the most part, the courts endorsed the latter position.[349]

On the rare occasions that women made it past the prima facie stage, employees tried to show that an employer's purportedly neutral reason for using a pregnancy-blind policy was a pretext for sex discrimination.[350] Before *Young*, proving pretext was hard. The Sixth Circuit rejected a PDA challenge because the employee lacked strong enough evidence that employers had adopted a pregnancy-blind policy for discriminatory reasons.[351] Establishing such an evidentiary foundation was often likely to be difficult and expensive. Employees might need to conduct "an examination of how the policy came to be enacted and why," to locate "evidence about women's status generally within the employer's ranks," and to conduct "interviews . . . [of] current and past employees about employer attitudes concerning pregnancy or women in the workplace."[352] As Joanna Grossman and Gillian Thomas recognize, however,

344. *Young II*, 135 S. Ct. at 1354.
345. *See id.*
346. *See* Grossman & Thomas, *supra* note 13, at 36–37.
347. *See id.* at 37.
348. *See, e.g.*, *id.* For examples of decisions on this point, see, e.g., *Spivey*, 196 F.3d at 1313; *Urbano*, 138 F.3d at 206.
349. *See, e.g.*, Grossman & Thomas, *supra* note 13, at 36–37.
350. *See, e.g.*, Reeves v. Swift Transp. Co., 446 F.3d 637, 641–42 (6th Cir. 2006), *abrogated by Young II*, 135 S. Ct. 1338.
351. *Id.*
352. Grossman & Thomas, *supra* note 13, at 40–41.

even workers who can bring forth this kind of evidence must counter arguments that they demand "special treatment."[353]

Young provides some reassurance for pregnant workers proceeding under *McDonnell-Douglas*. To make out a prima facie case, *Young* made clear that workers needed only to show that the employer accommodated other workers similar in their inability to work. If an employer adopts a pregnancy-blind policy that accommodates nonpregnant workers with similar physical disabilities, most lower courts would have rejected a disparate treatment claim out of hand. After *Young*, if an employer uses a similar pregnancy-blind policy, a worker should make it to the last step of the burden-shifting analysis.

Young also makes it easier for pregnant workers to show pretext. Both the majority and Justice Alito's concurrence draw attention to the impact of an exclusionary policy and the stated reasons for it. If a policy excluded most pregnant workers while covering all others, the majority reasoned that a jury could reasonably infer a discriminatory intent, particularly when the employer's justification did not seem strong enough to rationalize such a significant impact.[354] Under Justice Alito's approach, courts applying the burden-shifting framework would compare pregnant workers to others assigned the same job and similar in their inability to work. Alito's skepticism about UPS's accommodation of workers who lost their DOT certification stemmed from the kind of mismatch between the employer's stated means and ends that troubled the majority. At least some of the time, pregnant workers and drivers without DOT certification could perform the same tasks. For Alito, UPS had simply not offered a good enough reason for providing an accommodation to the latter group of workers while denying one to the former.

Just the same, after *Young*, real obstacles still stand in the way of pregnant workers relying on individual disparate treatment. The majority's reasoning presupposes that there are nondiscriminatory reasons for treating pregnant workers differently beyond their inability to perform certain tasks.[355] The Court specifically mentioned distinctions based on "special duties, special service, or special needs," but left the door open for employers to identify more nondiscriminatory reasons to single out pregnant workers.[356] As a result, *Young* still allows employers to circumvent the principle of meaningful choice written into the PDA. Under the PDA, after choosing to accommodate any employee, the employer can exclude pregnant workers only if they differ from others in their inability to perform certain tasks. By allowing employers more room to exclude

353. *Id.* at 41.
354. *Young II*, 135 S. Ct. at 1354–55.
355. *See id.* at 1354.
356. *Id.* at 1350.

pregnant workers, *Young* still does too little to guard against the burdens on reproductive decision-making targeted by the PDA.

To defeat a plaintiff's claim at the summary judgment stage after *Young*, an employer may simply have to offer a persuasive reason for leaving pregnant workers out. The majority countenanced the possibility that some pregnancy-blind policies—including UPS's own rules—would pass muster.[357] *Young* makes clear that as a policy more heavily burdens pregnant women, employers must bring forth more persuasive reasons for discriminating.[358] However, the burden on pregnant workers is relative. If employers exclude all pregnant workers and many nonpregnant workers, the kind of significant burden that the *Young* Court describes may not exist. Even a burden as onerous as the one created by UPS may still survive as long as the employer makes a sufficiently compelling argument for it. Theoretically, employers could have good reason to reward only those injured on the job for the hazard incurred during service. Accommodations for those injured on the job effectively exclude all pregnant women, but under *Young*, such a defect may not be fatal. For Justice Alito, a pregnancy-blind policy excluding workers who do not have a disability under the ADA would present no problem under the PDA.[359] After *Young*, pregnancy-blind policies will less often absolve employers of responsibility for pregnancy discrimination. However, given the circuit courts' receptivity to these policies, *Young* still allows employers to treat pregnant workers differently because of the source of their disability—their pregnancy.

Worse, *Young* reinforced the "most-favored-nation" reasoning underlying the lower courts' treatment of pregnancy-blind policies.[360] Both the majority and concurrence reasoned that the PDA could not require employers to treat pregnant women the same as others based on their inability to work without requiring the kind of special treatment Title VII prohibits.[361]

The reproductive-liberty analysis favored by feminists and pro-lifers in the 1970s may help workers overcome the hurdles created by *Young*. Presenting the law as a protection against special burdens on reproductive liberty gave both movement and countermovement activists in the 1970s a way out of the reverse-discrimination dilemma. Activists successfully reframed the PDA as a protection against special burdens on women's reproductive liberty rather than a guarantee of preferential treatment.

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357. *See id.*
358. *See id.* at 1354.
359. *Id.* at 1360–61 (Alito, J., concurring).
360. *See id.* at 1349–50 (majority opinion); *id.* at 1357–59 (Alito, J., concurring).
361. *See id.* at 1349–50 (majority opinion); *id.* at 1357–59 (Alito, J., concurring).

Now, reviving the liberty analysis used in the PDA debate may also help the courts understand individual disparate treatment analysis in different terms. Under *Young*, at the pretext stage, the courts effectively balance competing considerations, evaluating the strength of an employer's justification against the impact a policy has on pregnant women. That impact should include not only the number of women affected by a policy but also the burden on reproductive decision-making that a policy imposes. Giving employers an out so long as they exclude a sufficient number of nonpregnant workers does nothing to remedy the special burden prohibited by the PDA. Nor should many justifications for excluding pregnant workers be considered sufficiently weighty to justify the reproductive burden inherent in pregnancy-blind policies. To define comparators too narrowly would once again ensure, contrary to the intent of the PDA, that "women workers would face serious obstacles to continuing their pregnancy and maintaining their jobs at the same time."[362]

Justice Alito suggested that UPS's policy of accommodating only disabled employees would likely qualify as a sufficient, nondiscriminatory purpose under *Young*.[363] However, the majority mentioned that the Americans with Disabilities Amendments Act of 2008 might change the courts' analysis of whether pregnancy itself may constitute a disability. This Part turns next to the disability-discrimination challenges that may be available to pregnant workers after *Young*.

D. Pregnancy as a Disability Under the ADAAA

The ADA prohibits discrimination on the basis of qualified disability status and demands that employers provide "reasonable accommodations" for qualified individuals unless doing so would impose an "undue hardship."[364] The ADA treats an individual as disabled when she either has or is regarded as having "a physical or mental impairment that substantially limits one or more major life activities of such individual."[365] After the Supreme Court substantially narrowed the definition of a qualifying disability, Congress responded by enacting the 2008 ADA Amendments Act (ADAAA).[366] The ADAAA clarified that the statutory definition of disability should be "construed in favor of broad coverage" and explicitly repudiated the Court's prior interpretations.[367] The ADAAA also required a court to treat a condition as a disability regardless of the effect of mitigating measures, such as medication or hearing

362. 124 CONG. REC. 36,818 (1978).
363. *See Young II*, 135 S. Ct. 1338, 1360 (Alito, J., concurring).
364. 42 U.S.C. § 12112(b)(5)(A) (2012).
365. 42 U.S.C. § 12102(1) (2012).
366. Widiss, *supra* note 18, at 1006.
367. ADA Amendments Act of 2008 (ADAAA) §§ 2, 4, 42 U.S.C. § 12102(4)(a)–(e) (2012); *see also* 29 C.F.R. § 1630.2(j)(1)(iii) (2012) ("[T]he threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis.").

aids, and regardless of the fact that a condition was episodic or in remission.[368]

As Jeannette Cox has shown, the ADAAA provides a strong foundation for efforts to define "normal" pregnancy, and not just pregnancy complications, as a disability.[369] The ADAAA makes explicit that "impairment[s]" that cause "substantial" limitations in "walking, standing, . . . lifting, [or] bending" qualify as disabilities.[370]

Although the ADAAA has significantly expanded the definition of a disability, the few courts to consider the issue have responded with ambivalence to claims that "normal" or even "abnormal" pregnancy counts as a qualified disability.[371] Consider, for example, the case of Victoria Serednyj, an activity director at a nursing home operated by Beverly Healthcare, LLC (Beverly).[372] Serednyj's job sometimes required her to perform physical tasks, like rearranging chairs, transporting residents to activities, or carrying shopping bags.[373] Serednyj had previously suffered a miscarriage, and when she became pregnant again, she had complications that required her to avoid strenuous physical labor.[374] Her employer refused to transfer her to a light-duty position because she had not been injured on the job.[375]

Serednyj argued, among other things, that Beverly's failure to grant her request constituted both disability discrimination and a failure to accommodate under the ADA, since her pregnancy prevented her from doing daily tasks like bending and lifting.[376] While acknowledging that pregnancy may count as a physical impairment, the Seventh Circuit concluded that Serednyj could not show that her impairment "substantially limited" a "major life activity."[377] Finding that "[p]regnancy is, by its very nature, of limited duration" and that "any complications which arise from a pregnancy generally dissipate once a woman gives birth," the Seventh Circuit rejected Serednyj's claim.[378] Regardless of the impact of the ADAAA, as *Serednyj* shows, courts may reject any disability claim based on the fact that pregnancy and its complications have only a temporary effect.

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368. *See* 42 U.S.C. § 12102(4)(A)–(E) (2009).

369. Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. Rev. 443, 444–45 (2012).

370. 29 C.F.R. § 1630.2(i)(1)(i), (j)(1)(viii–ix) (2012).

371. *See, e.g.*, Serednyj v. Beverly Heathcare, LLC, 656 F.3d 540, 554–57 (7th Cir. 2011); Payne v. State Student Assistance Comm., No. 1:07–cv–0981–DFH–JMS, 2009 WL 1468610, at *3 (S.D. Ind. May 22, 2009).

372. *Serednyj*, 656 F.3d at 545.

373. *Id.*

374. *Id.* at 545–46.

375. *Id.* at 546–47.

376. *See id.* at 552.

377. *See id.* at 554–56.

378. *Id.*

Young itself offers few clues about how the Court would view claims that pregnancy would constitute a disability after the ADA Amendments Act. Just the same, the history provided here bolsters Cox's analysis. During the battle for the PDA, business lobbyists urged Congress to distinguish "normal" pregnancy from other disabilities because it was temporary and (at least often) voluntary. Reproductive-liberty analysis allowed legislators to see through this argument. Assume that an employer wishes to accommodate only nonpregnant workers. She can do so as long as she does not formally categorize workers on the basis of pregnancy or related conditions. Achieving the same result—excluding pregnant workers from generally available accommodations—would be easy. Accommodating only workers injured on the job effectively disqualifies any pregnancy-based request, since women rarely conceive at work. To be sure, the PDA did not require employers who provided no accommodations to do so for pregnant employees.[379] However, as the Article shows, the diverse constituencies supporting the PDA did demand that pregnant women be judged on their ability to work, not their pregnancy—the "source" of their disability. Ignoring this consensus allows employers to burden women's reproductive decisions in precisely the way the PDA forbids.

E. Disparate Impact Claims

Joanna Grossman and Gillian Thomas point to the promise of disparate impact claims for women challenging pregnancy-blind policies.[380] Because the plaintiff did not explicitly pursue such a claim, *Young* did not consider the merits of such a strategy. To make out a prima facie case, workers must show a specific and identifiable employment practice (here, a pregnancy-blind policy) that had a statistically significant effect on a protected class.[381] As Grossman and Thomas recognize, the courts appear to have loosened the evidentiary burden in the light-duty context, allowing pregnant workers to rely on general statistics about "the number of women who can be expected to become pregnant during their working lives . . . as well as the extensive literature concerning pregnancy's physical effects."[382]

However, the disparate-impact theory mostly remains untested, since courts have not yet fully addressed the employer's business necessity defense: that is, whether pregnancy-blind policies are job-related and serve a business necessity.[383] Grossman and Thomas convincingly argue

379. See 123 CONG. REC. 29,660 (1977).
380. Grossman & Thomas, *supra* note 13, at 41–49.
381. *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994–95 (1988).
382. Grossman & Thomas, *supra* note 13, at 45–47.
383. *Id.* at 47–48.

against several likely defenses, including claims based on cost and the volume of available, "real" light work.[384]

However, the biggest problem with disparate impact claims may lie in the "special treatment" trap set by early opponents of the PDA and reinforced by the *Young* majority. The *Urbano* Court concluded that Title VII forbids all policies that are not pregnancy blind.[385] By granting women a benefit that men could not receive, as the courts concluded, the employer may discriminate on the basis of sex.[386] The Supreme Court's decision in *Ricci v. DeStefano*[387] reinforces this analysis of pregnancy-based accommodations. Although decided in the context of race discrimination, *Ricci* expressed skepticism about the legality of affirmative efforts on the part of the employer to address disparate impacts, particularly when those efforts resemble "reverse discrimination."[388] In that case, the City of New Haven set aside the results of a written test for the promotion of city firefighters since it had a racially disparate impact.[389] Applying the strong-basis-in-the-evidence standard from equal-protection jurisprudence, the Court held that New Haven's decision constituted impermissible treatment under Title VII.[390]

Scholars read *Ricci* in a variety of ways: from suggesting that the Court requires color- (or pregnancy-) blindness in all but the rarest cases to arguing that *Ricci* creates a new defense for employers in disparate-impact cases who were not aware that a policy would have a disparate impact.[391] What seems clear is that *Ricci* narrowed the scope of disparate-impact claims, providing a powerful weapon for those who frame pregnancy accommodation as special treatment. On its face, *Young* offers little comfort to those relying on a disparate-impact theory. The majority and concurrence give ammunition to employers framing requests for accommodations as demands for "most-favored nation status."

The liberty analysis set forth here may help strengthen the case for disparate impact in a post-*Ricci* world. In debate surrounding the PDA, feminists and pro-lifers convinced members of Congress that demands

384. *See id.* at 47–49.

385. Urbano v. Cont'l. Airlines, Inc., 138 F.3d 204, 208 & n.2 (5th Cir. 1998), *abrogated by* Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338 (2015).

386. *See id.*

387. 557 U.S. 557 (2009).

388. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1343–44 (2010) (discussing the constitutional implications of *Ricci*); Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 675 (2011) (explaining that *Ricci* "casts doubt on the legality of the disparate impact doctrine").

389. *Ricci*, 557 U.S. at 561–62.

390. *See id.* at 584–87.

391. *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1871–74 (2012) (using *Ricci* as evidence that "[t]he Roberts Court seems determined to fully enforce past colorblind reasoning—indeed, to expand its reach"); Primus, *supra* note 388, at 1363–75 (canvassing other interpretations of *Ricci*); Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 58 (2013) (arguing that *Ricci* allowed "majority plaintiffs to challenge a civil rights law by standards not available to minority plaintiffs challenging the criminal law").

for "special treatment" in fact constituted calls for protection against the unique burdens imposed on women balancing childbearing and careers.

The federal courts—and the Supreme Court—should overrule decisions relying on the principle of pregnancy blindness. The history of the PDA makes clear that it requires much more. Just the same, as the Part next explains, the courts may not be the most promising place to challenge pregnancy-blind policies.

F. The Return to Legislative Constitutionalism

The history of the battle for meaningful choice illustrates not only the constitutional values realized by the PDA but also the shortcomings of litigation as a tool for seeking accommodations for pregnant workers. Because of courts' reliance on precedent, judicial decision-making remains more path-dependent.[392] As a conservative plurality on the Supreme Court reads color-blindness into the Equal Protection Clause, courts are more likely to view Title VII as a guarantee of sex and pregnancy blindness—one centered on formal equality and fundamentally opposed to any accommodations. The *Young* Court's hostility to "special treatment" ignores the meaning and history of the PDA, but the Court's discomfort with the very idea of accommodation flows naturally from recent Equal Protection and Title VII jurisprudence.

Congress's institutional advantages—an ability to work incrementally, democratic accountability, and the capacity to create redistributive remedies—make the legislative arena a more promising place for contemporary proponents of meaningful choice. Superficially, Congress may not seem to be a promising place to do much of anything. Defined by gridlock, partisan polarization, and astonishingly low poll ratings, Congress seems unlikely to advance any legislative agenda, let alone one related to either equality or liberty.[393]

Moreover, an accommodation-centered policy has drawbacks of its own. Some scholars worry that an accommodation-centered policy would reinforce gender-paternalist attitudes or encourage employers to avoid hiring women in the first place.[394] Michael Selmi, for example, has

392. *See, e.g.*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) (noting that judicial decisions are "path dependen[t]" in the sense "that courts' early resolutions of legal issues can become locked-in and resistant to change" due to a variety of factors, including stare decisis, even when change in legal rules is needed "to respond to changing underlying conditions").

393. This Congress is the most gridlocked in history. *See* Jonathan Weisman, *In Congress, Gridlock and Harsh Consequences*, N.Y. TIMES (Jul. 7, 2013), http://www.nytimes.com/2013/07/08/us/politics/in-congress-gridlock-and-harsh-consequences.html?pagewanted=all&_r=0 ("At this time in 2011, Congress had passed 23 laws on the way toward the lowest total since those numbers began being tracked in 1948.").

394. *See, e.g.*, Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 115 (1989) (expressing concern that accommodation might "simply reconstitute [women's] role in a new and more oppressive patriarchy"); Michelle A. Travis, *Equality in the Virtual Workplace*,

argued that disparate-impact theory, an approach sympathetic to accommodation rights, has "stunted the evolution of a more robust definition of intentional discrimination."[395] Samuel Bagenstos contends that broad, structural, accommodation-centered remedies lack the "generally accepted normative underpinnings of antidiscrimination law."[396]

However, as the history presented here makes clear, the PDA mattered to members of Congress and grassroots supporters because it helped to give meaning to important constitutional values surrounding reproductive liberty. As Joanna Grossman argues, an accommodation regime would "create a counter-narrative of a woman's proper place."[397] As importantly, an accommodation law would more accurately reflect the movement–countermovement consensus on reproductive liberty that emerged in debate on the PDA. A new legislative constitutional campaign might represent the next logical step in the expression of those values.

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 proposed federal 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.[398] The PWFA would make it unlawful for employers to deny accommodation to pregnant women unless doing so would represent an "undue hardship."[399] Seven states have already passed such accommodation legislation, as have some local governments like the New York City Council.[400]

Legislative constitutionalism may well be the most promising path for legislators and grassroots activists who want to give further meaning

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24 BERKELEY J. EMP. & LAB. L. 283, 327–28 (2003) (noting that a mandate to accommodate caregiving obligations could "translate into paternalism, as the beneficiaries are viewed as uniquely in need of extra assistance or protection. Paternalism, like resentment, could lead to further limits on women's opportunities and roles." (footnote omitted)).

395. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 U.C.L.A. L. REV. 701, 781 (2006).

396. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 3 (2006).

397. Grossman, *supra* note 18, at 625.

398. Co-sponsored by members of Congress on either side of the abortion issue, the bill has been introduced in both the 113th and 112th Congress but has not been moved beyond committee in either the House or the Senate. *See* Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013); Pregnant Workers Fairness Act, S. 3565, 112th Cong. (2012); Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012).

399. *See supra* note 364 and accompanying text.

400. *See, e.g.*, Sean P. Lynch, *Philadelphia Enacts Pregnancy Accommodation Law*, NAT'L. L. REV. (Feb. 11, 2014), http://www.natlawreview.com/article/philadelphia-enacts-pregnancy-accommodation-law (summarizing state laws passed). For discussion of the New York City law, see, for example, Rachel L. Swarns, *Placed on Unpaid Leave, a Pregnant Employee Finds Hope in a New Law*, N.Y. TIMES (Feb. 2, 2014), http://www.nytimes.com/2014/02/03/nyregion/suspended-for-being-pregnant-an-employee-finds-hope-in-a-new-law.html.

to the reproductive-liberty norm written into the PDA. Legislative constitutionalism allowed feminists and antiabortion activists to make gradual progress in the realization of their constitutional commitments. Fundamentally, however, legal feminists and pro-lifers in the PDA battle concluded that women required accommodation, not equal treatment, to exercise true reproductive liberty. The PDA requires only that employers treat pregnant women the same as other workers with similar physical limitations. A hirer can circumvent the PDA by providing no accommodations at all. Obviously, such a policy may force a woman to choose between economic security and childbearing. So too may pregnancy-blind policies. Indeed, amici on either side of the abortion issue recognized the purpose of the PDA and unsuccessfully urged the Court to require employers to accommodate workers equally based on their inability to work rather than the source of their disability.[401] To give meaning to the values embraced by the PDA, activists may have to turn once again to the legislative arena.

CONCLUSION

Arguments for reproductive choice have few supporters, but widespread criticism of choice-based arguments in the courts has obscured their transformative potential. Dissatisfied with juridical constitutionalism, grassroots groups on either side of the abortion issue turned to Congress in expressing their constitutional commitments. Choice served as the touchstone of demands to analyze reproductive liberty and sex equality as inextricably linked—demands that blurred the distinction between negative and positive rights. The PDA emerged from debate between antiabortion activists, feminists, and business lobbyists about the meaning of the right to choose and the remedies appropriate for violations of that right. The law represented an incremental step on the path to guaranteeing women meaningful, rather than formal, reproductive choice.

Tracing the history of liberty norms and the PDA calls into question prevailing judicial interpretations of the protections the statute requires—including the Court's analysis in *Young*. But perhaps the fact that courts have relied on so narrow an interpretation of Title VII should come as no surprise. Now as before, for those seeking workplace fairness, the courts may not be the best place to look.

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401. *See, e.g.*, Brief of Amicus Curiae Black Woman's Health Imperative, Joined by Other Black Women's Health Organizations in Support of Petitioner at 13–15, Young v. United Parcel Serv., Inc. (*Young II*), 135 S. Ct. 1338 (2015) (No. 12-1226); Brief of Amici Curiae 23 Pro-Life Organizations and the Judicial Education Project in Support of Petitioner Peggy Young at 10–16, *Young II*, 135 S. Ct. 1338 (No. 12-1226); Amicus Curiae Brief of the American Civil Liberties Union and a Better Balance, et al., in Support of Petitioner at 6–12, *Young II*, 135 S. Ct. 1338 (No. 12-1226); Brief for Law Professors, *supra* note 316.