Amar, J., concurring in the judgment in part and dissenting in part in *Roe v. Wade*, No. 70-18, and dissenting in *Doe v. Bolton*, No. 70-40.

There is an important difference between the two abortion laws at issue before the Court today, both of which impose heavy burdens on women as women, without saddling men with comparable burdens. The Texas law, enacted in the 1850s, was passed by an all-male legislature that was in turn chosen by an all-male electorate. This old law cannot stand. The recently adopted Georgia law, by contrast, was enacted at a time when women could and did vote for and serve in the legislature. This new law raises issues that should be addressed in the first instance by Georgia courts, which have not yet had a chance to rule on various important questions of statutory construction and state constitutional law.

I. *Roe v. Wade*

Constitutional law must have some basis in the Constitution itself. U.S. Const. art. VI ("This Constitution . . . shall be the supreme Law of the Land."); *Marbury v. Madison*; *McCulloch v. Maryland*. Every member of this Court has sworn a personal oath to uphold the letter and spirit of the Constitution–as distinct from, say, the precepts of Hippocrates or the views of the AMA. See U.S. Const. art. VI ("all executive and judicial Officers . . . shall be bound by Oath or Affirmation, to support this Constitution."). And even if we were not oath-bound to do so, I believe that we should carefully consult the Constitution, and indeed lavish attention on its text, history, and structure, because this document distills a great deal of the collective and hard-won wisdom of the American People over the centuries. This wisdom, no less than the wisdom of the ABA or Hippocrates, can powerfully inform our judgment even where the text does not unambiguously dictate an outcome.

A. Due Process and the Ninth Amendment

Today's opinion by CHIEF JUSTICE BALKIN mentions, among other things, The Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. In relevant part, these two Amendments read as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. "No state shall . . . deprive any person of life, liberty, or property, without due process of law." Id. amend. XIV, sect. 1. See also id. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.")

As for the Ninth Amendment, although the opinion of THE CHIEF JUSTICE waves in the direction of this text, this opinion fails to make clear exactly how rights of "the *people*" in the Ninth Amendment become rights of individual *persons* to privacy; or how judges are to figure out what is and is not a Ninth Amendment right, or how this Amendment, with its roots in Anti-Federalist anxieties about the new federal government (and its courts), invites federal judges to strike down state laws. Cf. *Barron v. Baltimore*. Perhaps there are satisfying answers to such

questions, but today's opinion does not provide them. It's also worth noting that the District Court decision relying on the Ninth Amendment could point to no Supreme Court case ever decided using this Amendment to strike down a statute. If today's Court is truly serious about breathing judicial life into Ninth Amendment, it owes us more elaboration. In pondering whether a law violates the rights of "the people," might it be relevant to see what that "the people" have in fact claimed for ourselves in critical legal documents such as state constitutions? I would have thought so. Yet today's Court does not undertake any serious survey of these sources.

As for the Fourteenth Amendment Due Process Clause, the Court reads this clause as embodying an "abstract guarantee[] of liberty." Ante, at . But the Amendment's words (and the companion words of the Fifth Amendment) say no more about guaranteeing liberty than about guaranteeing property. Under the words of this clause, a government may indeed deprive a person of liberty or property, but it must provide "due process of law." *Process* of law. Due *process*, not due substance.

Liberty and property are spacious concepts. Almost all laws implicate, and in some measure restrict, some arguable liberty interest or property interest. If the mere existence of a liberty interest or property interest is enough to allow this Court to invalidate any law that (according to us) intrudes too far upon those interests or that (as we see it) lacks persuasive policy justification, we shall be very busy indeed. (During this Court's *Lochner* era, we invalidated roughly 200 regulatory statutes that violated this Court's sense of property rights.) More to the point, I do not believe that the text, history, and spirit of the Due Process Clause authorize us to embark on such an adventure. Nor is there anything in the word "liberty" or the history behind it that decisively differentiates erotic liberty or family-related liberty from many other aspects of liberty–of movement, of employment, of contract, and so on. Many forms of liberty–of speech and of worship, for example–also find refuge in specific language elsewhere in the Constitution, above and beyond the Due Process Clause. But as JUSTICE ROSEN explains, most of the provisions of the Bill of Rights–the First, Fourth, and Fifth Amendments, for example–are rather far afield of the facts at hand today.

I am aware that this Court has on other occasions read the word "process" to mean "substance." See, e.g., *Dred Scott v. Sanford*; *Lochner v. New York*. But the fact remains that the Constitution simply does not give this Court the right to ignore the word "process" and substitute "substance." Nor can it be said that there are strong reliance interests in "substantive due process" that now preclude our questioning of this judicial approach.

B. Privileges or Immunities

I do not reject the outcome of every case in which the Court has invoked "substantive due process." Many of these cases, on their facts, may well be defensible by reference to other constitutional words and structures. For example, in *Griswold v. Connecticut*, we recast *Pierce v. Society of Sisters* and *Meyer v. Nebraska* as cases rooted in First Amendment rights of speech

and expression. In my view, personal First Amendment rights are properly held applicable against the states via the following constitutional language: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, sect. 1.

These privileges and immunities include, at their core, individual rights and freedoms affirmed elsewhere in the Constitution, such as the privilege of habeas corpus, the right against unreasonable search or seizure, and the liberties of speech, press, petition, and assembly. Indeed, the special linkage between First Amendment freedoms and the Privileges or Immunities Clause is obvious on the very face of the clause, which borrows no fewer than five of its words–"No, shall, make, law, abridge"–from the First Amendment itself. More generally, as Justice Black has forcefully noted, Reconstruction history supports the view that the Fourteenth Amendment largely "incorporates" against the states most of the individual rights provisions of the Bill of Rights. See *Adamson v. California* (Black, J., dissenting); *Duncan v. Louisiana* (Black, J., concurring).

Like Justice Black, I do not believe that precedent properly precludes us from returning to the core meaning of the Privileges or Immunities Clause. Much of what the Court said about the clause in the 1873 *Slaughterhouse Cases* ranged far beyond what was necessary to decide these cases on their facts; and in any event, many of our subsequent decisions are best justified by open recourse to this clause. Over the last generation, we have effectively incorporated most of the Bill of Rights against the states; and these holdings are best grounded not in the language of the Due Process Clause, but in the words and spirit of the Privileges or Immunities Clause.

My own views about the details of this incorporation process differ somewhat from Justice Black's. Had the framers of the Fourteenth Amendment meant simply to incorporate Amendments One to Eight, no more and no less–or all rights affirmed in the Constitution (including, for example, the habeas right in Article I), but nothing more–there would have been clearer ways of saying so. As I read the clause's text, and its underlying history, it aimed to prevent states from abridging Americans' fundamental rights above and beyond those specifically mentioned in Amendments One through Eight, or elsewhere in the Constitution.

Are we, then, precisely back to where we started, with "substantive due process" under a different label? Not quite. The Privileges or Immunities Clause of the Fourteenth Amendment offers a democratically superior and judicially manageable alternative to our past experience with substantive due process.

In the substantive due process arena, Justices have typically consulted their own viscera, the views of their own social strata, and this Court's precedents. The reasons for this judiciary-centered approach are not hard to fathom. Because the very phrase "substantive due process" teeters on self-contradiction, the words of this phrase provide neither a sound starting point nor a directional push to proper legal analysis. The phrase does not clarify thought. It is a judicial Rorschach blot. Granted, once the first due process cases are on the books, these decisions may

launch the general doctrinal project. But since the entire concept is a judicial fabrication, the judicial phrase "substantive due process" unsurprisingly ends up encouraging the judiciary to consult itself, as the ultimate source of meaning. This judge-centered approach fails to do justice to the underlying vision of the Fourteenth Amendment itself, which reflected uneasiness about judicial adventurism. (The first sentence of the Amendment, after all, aimed to overrule parts of the infamous *Dred Scott* decision.)

Instead of beginning with a phrase of our own making–substantive due process–I suggest that we begin with the words actually used by the Amendment, and ponder the vision underlying these words. There was indeed a core set of fundamental freedoms that the People aimed to affirm in the Fourteenth Amendment's Privileges or Immunities Clause: freedom of expression and of religion, protection against cruel and unusual punishments, the safeguards of habeas corpus, and so on. These clear instances of inclusion, embraced by the people themselves when they ratified the Amendment, give us core cases–paradigm cases, so to speak–from which we can properly begin the doctrinal process of generalization, interpolation, and analogic reasoning.

Moreover, the Privileges or Immunities Clause suggests a more populist and less court-centered method for finding other fundamental rights, not specified in the Bill of Rights. The Fourteenth Amendment does not exhaustively list all the privileges and immunities of American citizenship, but it presupposes that such fundamental rights are catalogued elsewhere in documents that the *American people* have broadly ratified, formally or informally. In the eyes of those who drafted and ratified the Fourteenth Amendment, the federal Bill of Rights was one of these catalogues, a compilation of fundamental rights that the Amendment would henceforth guarantee ("incorporate") against states. But the Bill of Rights was not the only epistemic source of guidance. In other words, the Fourteenth Amendment incorporates more than the Bill of Rights. Magna Carta, the English Petition of Right, the Declaration of Independence, state bills of rights–all these, too, were proper sources of guidance for interpreters in search of fundamental rights and freedoms. Rather than a system in which Justices simply look to what they or their predecessors have declared fundamental in self-absorbed opinions, a more attractive and document-supported approach to the Privileges or Immunities Clause would invite this Court to canvass nonjudicial legal sources–the above-listed documents, state laws and constitutions, federal legislation, and so on–as critical sources of epistemic guidance. Such a law-canvassing approach would focus the members of this Court not on ourselves or our own individual or institutional wisdom, but on the wisdom of the American people more generally. Where it can be said that a law offends a principle that *the American people* have generally understood as fundamental, such law would invite judicial invalidation.

This law-canvassing approach helps explain the rightness of our decision in *Griswold v. Connecticut*. As Justice Harlan emphasized, the Connecticut contraception law at issue was utterly outlandish, as measured by the laws of all the other states. "[C]onclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or another had on the books statutes forbidding or regulating the distribution of

contraceptives, none so far as I can find, has made the *use* of contraceptives a crime."

But this ground for reaffirming the basic holding of *Griswold* today furnishes a dubious basis for invalidating abortion laws that, as JUSTICE ROSEN's dissenting opinion makes clear, are far from unusual or outside the mainstream of American legislation.

One final note on the law-canvassing approach. Suppose that this Court were to strike down a state law as wholly outside the mainstream of American fundamental freedom, as defined by actual legal practice. Suppose further that after this ruling, many other states were to enact similar laws–say, with delayed effective dates so as to allow for anticipatory judicial review–in order to spark a judicial reconsideration of the issue. On my view, these later enactments could properly call into question our initial grounds for invalidation, and give rise to a genuine dialogue between the judiciary and the larger polity on the issue of evolving unenumerated rights. Indeed, America is now in the middle of just such a democratic dialogue on the death penalty, prompted in part by our recent decision in *Furman v. Georgia*. Just as the word "unusual" in the Eighth Amendment invites this Court to consult the broad penal practices of America in order to get a sense of the contemporary American ethos of punishment, and the broad public understanding of cruelty, so the words "privileges or immunities of citizens" invite this Court to listen to what citizens actually believe their fundamental rights to be, as expressed in key legal texts and practices.

C. Privacy and Precedent

THE CHIEF JUSTICE's basic analysis of liberty and privacy is not fundamentally textual, or historical, but rather doctrinal, relying mainly on *Pierce*, *Meyer*, *Skinner v. Oklahoma*, *Griswold*, and *Eisenstadt v. Baird*.

None of these cases on its facts involved abortion. None involved the destruction of an unborn embryo or fetus. Generally speaking, one of the virtues of doctrinalism is that it proceeds in small steps from like case to like case. But today's ruling, going far beyond a series of cases that are inherently different, lacks this traditional doctrinal virtue.

The Court marches ahead under the banner of "privacy." "Privacy" would seem an apt word for the claim, say, of two or more consenting adults (whether married or not, and whether or not of the same sex) to engage in forms of intimate physical contact behind closed doors in a manner that imposed no direct injury or "harm" on others. (I use "harm" here in a way elaborated by John Stuart Mill's *On Liberty*.) But THE CHIEF JUSTICE's opinion, as I read it, does not go so far as to confer constitutional protection on all such self-regarding/no-harm-to-others behavior. More to the point, in the abortion context, "privacy" seems an inapt concept unless we simply define away the harm to the fetus. "Privacy" may be a good word to describe a claimed right to contraception, but in the abortion context the word would seem to beg the question of the status of the fetus. Surely, for example, there is no "privacy" right to commit infanticide or child abuse.

There are indeed plausible textual reasons for not treating the unborn as "persons" within the meaning of the Constitution. (The Fourteenth Amendment itself begins with a reference to "born" persons, as I shall elaborate below.) But even nonpersons may have interests deserving legal protection. A pet dog is not a person, yet the law may protect it from cruelty or wanton destruction; society does not view this purely as a question of the owner's "privacy." If persons have no "privacy" (or "liberty") right to set aside laws prohibiting cruelty to animals, why do persons have a "privacy" or "liberty" to right to set aside laws prohibiting cruelty to human fetuses? If fetuses are simply imagined away in a privacy analysis, does this mean that a state would be barred from punishing as murder or intentional manslaughter the actions of a thug who shoots a pregnant women in the abdomen and thus knowingly kills the fetus? (Such would seem to be the implication of JUSTICE TUSHNET's dismissive views of unborn human life. With a judicial coup de main, his separate opinion simply sweeps the previable fetus off the table, relying heavily on nonjudicial writings of former- Justice Clark. Perhaps JUSTICE TUSHNET would, outside the abortion/privacy context, allow the state to protect the unborn against the hypothesized thug. But if so, then talk of a pure privacy right to abortion would seem to have a touch of circularity about it.)

THE CHIEF JUSTICE argues that Texas does not really care about protecting unborn human life because its law also reflects cross-cutting and countervailing concerns (as does Georgia's law). JUSTICE ROSEN's dissenting opinion exposes some of the problems with the Court's analysis here; laws often reflect and balance a cluster of legitimate concerns. See generally Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972). Is THE CHIEF JUSTICE serious when he suggests that were Texas to punish women themselves who seek to self-abort, such an extension of its abortion laws would render its legal code *more* constitutionally defensible? (JUSTICE SUNSTEIN also casts doubt upon whether Texas's abortion law "will, in fact, provide meaningful protection to fetal life." But he points to no evidence that those states that prohibit abortions in fact have the same rate of actual abortions as those that allow it. Would he find Texas's law more constitutionally defensible if Texas cracked down harder on illegal abortions?)

THE CHIEF JUSTICE also quotes language from our decision last Term in *Eisenstadt v. Baird* : "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." I do not think we crossed the abortion bridge in *Eisenstadt*, which was a contraception case, not an abortion case. To the extent that THE CHIEF JUSTICE might seek to place super-strong weight on the word "bear" as distinct from the word "beget," a permissible alternative reading of these words is that in *Eisenstadt* we affirmed the right of individual *men* not to procreate ("beget") just as we affirmed the rights of women not to *procreate* ("bear"). In support this male-female reading of *Eisenstadt*, I should note that the case that we cited immediately after this sentence was a case about a man and his erotic activities, *Stanley v. Georgia*. And, to repeat, the bear/beget language appeared in the context of a contraception case where no fetus in being existed. Thus, I do not think we should

treat a stray word or phrase in *Eisenstadt* as having somehow squarely faced and answered the momentous legal and moral questions surrounding abortion. Indeed, the words "fetus" and "embryo" do not even appear anywhere in the case. Thus, it would be irresponsible–a kind of judicial bait and switch–to treat one word in that case ("bear") as dispositive of the issues we confront today for the first time.

It is also worth noting that the quoted *Eisenstadt* language did not command the support of five Justices in that case. Even if it had, the question today would remain, from whence did *Eisenstadt* derive this right? To repeat, our ultimate fidelity must be to the Constitution itself; and if our cases were themselves were not properly grounded in the document, we need not slavishly follow and extend these cases, or their broadest dicta.

D. Prudence and Humility

Given the vast legal and moral complexities and profundities implicated by the abortion question, and given that today is this Court's first real occasion to consider the topic, members of this Court should proceed with extraordinary humility and caution. This Court has made many mistakes in its past–especially in the context of substantive due process. See, e.g., *Dred Scott v. Sanford*; *Lochner v. New York*. We Justices are not infallible. And today we confront some of the deepest questions of human existence, issues on which many thoughtful men and women of good will have strongly disagreed and may continue to do so for years to come. On these issues, it is not clear to me that judges and Justices are any wiser than others. Unless the Constitution speaks with crystal clearness on the issue at hand–and I confess that I do not see perfect clarity, even as I offer my own best preliminary judgment–there are good reasons for us not to decide more than is necessary today.

E. Women's Equal Citizenship

For me, a key constitutional point to keep in mind today is that abortion laws impose severe burdens on women, burdens that are not imposed on identically-situated men (a null set) or even on analogously situated men. Moreover, these burdens may well make it difficult for women as a group to participate on fully equal terms in political life–as lawmakers and jurors for example.

The Fourteenth Amendment begins by affirming that "All persons born or naturalized in the United States . . . are citizens." This sentence squarely aimed to repudiate some egregious language in the *Dred Scott* case, where Chief Justice Taney had proclaimed that blacks, even if free, could never be citizens. The Fourteenth Amendment emphatically rejected this racist suggestion in *United States Reports*. The Amendment thus affirms that all blacks born in America are indeed citizens. And not just citizens, but *equal* citizens–that is the deep premise of this sentence, understood in its historic context. Writing for the Court in1896, the first Justice Harlan (who understood the Fourteenth Amendment far better than did his brethren in cases such

as *Plessy v. Ferguson* and *The Civil Rights Cases*) glossed the first sentence of the amendment as follows: "All citizens are equal before the law." *Gibson v Mississippi*. In the next sentence of the Amendment, the word "equal" appears prominently and for the first time in the Constitution: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." A companion statute, the Civil Right Act of 1866, also speaks of the right of "citizens" to the "full *and equal* benefit" of various civil rights.

In the minds of those who drafted and supported the Fourteenth Amendment, this equality of citizenship, of civil rights, and of legal protection was not limited to racial equality. The word "race" nowhere appears in the Fourteenth Amendment, as it does in the Fifteenth. Surely, if the framers of this Amendment had meant to limit the idea to race, they knew how to say so. But they intentionally chose broader words. What kind of equality, broader than mere racial equality, is affirmed in this Amendment? The word "born" in the first sentence helps us to see the core textual idea: government should disavow laws heaping disadvantage on a person because of that person's *status at birth*. Government should not penalize or discriminate against a person because he was born black, or a slave, or poor, or Jewish, or out of wedlock. Or because she was born female.

The history surrounding the adoption of the Fourteenth Amendment shows that issues of sex equality were intertwined with issues of race equality in the 1860s. The very language of the Fourteenth Amendment in fact resembled wording that Elizabeth Cady Stanton herself endorsed in 1865, which she in turn borrowed from the Seneca Falls Declaration of 1848. (Stanton called for an amendment in which "the women as well as the men shall be secured in all the rights, privileges, and immunities of citizens." The Seneca Falls Declaration had demanded that women receive "all the rights and privileges which belong to them as citizens of the United States.") Although the burgeoning women's rights movement disliked the sexism of Section 2 of the Fourteenth Amendment, which inserted the word "male" into the Constitution for the first time and excluded women from states' presumptive electorates, women generally embraced the letter and spirit of Section 1, which aimed to affirm "civil rights"–as distinct from "political rights" such as voting, office holding and jury service. Indeed, the very distinction between civil and political rights–a distinction at the foundation of the Fourteenth Amendment–drew upon the model of women's rights: Unmarried white women enjoyed most civil rights but not political rights. In effect, the Fourteenth Amendment's opening words promised blacks the historic rights of these women, whose legal entitlements thus helped define the central meaning of Section One's organizing category of full and equal civil rights.

Granted, it is doubtful that in the 1860s all discriminations against women were viewed in exactly the same way as discriminations against blacks. Traditional marriage law subordinated the woman to the man; but a law allowing a black and a white to join together as business partners only so long as the white was the senior partner would plainly violate the Amendment. Withholding the vote (and the associated rights to serve on juries and to sit in the legislature) from women because of their birth status was not seen as an impermissible discrimination even though similar discriminations against black men were soon prohibited by the Constitution, in its

Fifteenth Amendment.

But as I read the Constitution *as a whole*, the eventual adoption of the Nineteenth Amendment, granting women the suffrage in virtually identical language to the Fifteenth Amendment's grant to blacks, argues for a robust reading of women's equal protection and women's equal citizenship. (The Nineteenth Amendment reads as follows, in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." Whereas this amendment ends with the word "sex" the Fifteenth Amendment ends with the words "race, color, or previous condition of servitude." Otherwise the two provisions are identical.) In my view, these kindred Amendments aimed to make blacks/women the full equals of whites/men in the political domain, including not simply the right to vote for legislators but the right to vote in a legislature–the right to be a legislator, the right to be voted for–and likewise the right to serve and vote on juries or to hold other political office.

Once the Constitution vested women with full and equal political rights, shouldn't entitlement to the full and equal enjoyment of lesser civil rights follow a fortiori? Discriminations that might once have seemed legitimate based on an old-fashioned view of woman's role and capacities become illegitimate when the *Constitution itself*, in a later amendment, affirms a very different and more robust vision of women as full and equal members of the political People who govern America. In essence, we must read the words of the Fourteenth Amendment in light of a later chapter of America's constitutional saga, namely the Nineteenth Amendment. (For an early example of a case reading the Fourteenth Amendment rights of women more sweepingly in light of the Nineteenth, see Adkins v. Children's Hospital (1923).)

F. Pregnancy and Abortion

With this understanding of the letter and spirit of the Fourteenth and Nineteenth Amendments' affirmation and reaffirmation of women's equal citizenship, I now turn to the vexing question of abortion. Although abortion laws often operate directly upon physicians of both sexes (as is true in Texas), the primary burden of the law lands upon the pregnant woman herself, who is in effect obliged to carry her unwanted pregnancy to term. The obligation to bear an unwanted pregnancy is a heavy one, both literally and figuratively. As a practical matter, it can require a woman to end her education or career, at least temporarily. It can impose serious financial burdens and medical risks. It can put her at risk of physical attack from the biological father or a man who suspects that he is not the biological father. It can dramatically interfere with her general freedom of movement, her daily routine, her diet, her relations with others around her, her mental state, and her body more generally. Especially in cases of rape and incest, the pregnancy itself can impose severe mental trauma on her. After she has given birth, psychological and social pressures may make it difficult for her to give the baby up for adoption. In that event, the serious burden of an unwanted pregnancy is only the beginning of the obligations that she will bear, and the possible sacrifices she may be obliged to make.

Texas's justification for imposing such heavy burdens on the pregnant woman–even in cases of rape and incest–is to protect the life of the unborn and innocent human life inside her womb. Her liberty is abridged so as to protect its life. In effect, the Texas law has chosen life over liberty.

The problem, however, is that Texas has chosen to impose these life-sustaining burdens only on women. It is at least possible to imagine alternative ways of promoting unborn human life. For example, in the case of unmarried women, the law could require the biological father to remunerate the woman for half of the total financial and physical burdens that she must bear during the course of her pregnancy. This more gender-neutral approach would require him to compensate her for her child-bearing expenses, work, and labor, and thus to bear his fair share of the burden. (The law could of course allow any woman who so desired to opt out of this compensation entitlement.) In response, it might be said that "nature" imposes the burden on her, not him. But "nature" also makes abortion possible. If the law intervenes to limit her "natural" freedoms, why not his?

Indeed, in the act of procreation itself, men would seem to bear equal if not more responsibility on average. It is possible to imagine sexual intercourse in the absence of full male consent (as in the case of statutory rape involving an adult female and an underage male). Nevertheless, sex in the absence of full consent by the woman–because of male coercion that rises to the level of legal rape, or some lower level of force or fraud–is more common than sex in the absence of full consent by the man. Thus one could argue that conscription of a father's income stream is actually *easier* to justify than conscription of a mother's womb. In almost every case, his commission of the sex act was voluntary; but in many cases, hers may not have been. And yet, to repeat, the law saddles her with special burdens while exempting him. Texas obliges her to give up nine months of her life to sustain the unborn life, but does not oblige him to give up even nine dollars.

Of course, it can be argued that pregnancy is simply a unique case: "This is not really discrimination between women and men, but simply discrimination between pregnant persons and nonpregnant persons." I wonder. Surely, government should not be free to subordinate women so long as it does so via laws that use women's unique biology to disadvantage them as a class. Imagine, for example, a law that said that pregnant people cannot vote, or cannot serve on juries, or be elected to office. Would not such a law plainly violate the Nineteenth Amendment? But if so, isn't this a square admission that laws heaping disabilities on pregnant persons are indeed laws discriminating "on account of sex"?

Of course, in some situations, our governments have conscripted men. However, when male soldiers have been drafted–deprived of their liberty to protect others' lives–government has at times furnished them with educational and other benefits after their term of service has ended. But when pregnant women are asked to disrupt their careers and education in order to protect unborn life, government has not showered comparable benefits upon them. There is no Mothers' Bill of Rights akin to the GI Bill of Rights. Indeed, in Texas and many other places, public

schools and public employers have generally been allowed to expel or fire unmarried pregnant women, but have not expelled or fired the men involved with equal vigor. If Texas meant to minimize its imposition on the life and liberty of women, I suspect the state could also do much more than it has done to facilitate and encourage adoption (perhaps even through publicly supported institutions that would help any woman who so desired to keep the pregnancy itself confidential as well as the later adoption). I further suspect that Texas could do far more to support public institutions providing medical assistance and other services to indigent women bearing unwanted pregnancy.

Indeed, if Texas truly aims to minimize the burdens of unwanted pregnancy it imposes on females, why has the state chosen to make it especially difficult for certain rapes to be proved? Under Texas law, in certain rape cases the victim's testimony cannot suffice to convict a rapist in the absence of physical corroboration or "fresh complaint." No comparable rule exists for male victims of nonsexual assault. In virtually all other Texas criminal cases, a single witness's uncorroborated testimony may lawfully suffice to convict. But not for certain rapes. These extant Texas evidence laws have their origin in an explicitly gendered set of rules about "female[s] alleged to have been seduced." Such laws were passed at a time when no woman was allowed to vote in Texas–just like the Texas abortion law at issue today. These old evidence laws in effect singled out some persons on the basis of their birth status and declared that they, uniquely in our criminal justice system, were not fully reliable witnesses. To me, this would seem an obvious status insult to the equal citizenship of women. More than that, such laws would seem to deny rape victims the genuine equal protection of laws, a concept that at its core affirms the rights of victims to be equally protected by government from criminals. (The Fourteenth Amendment thus barred a state from looking the other way when white Klansmen murdered and pillaged black folk.) Indeed, Texas's evidence laws in rape cases eerily resemble the infamous Black Codes that forbade the conviction of whites on the testimony of blacks. All this casts in a troubling light the burdens that Texas has chosen to impose on pregnant women (even rape victims), while showing more solicitude for the liberty interests of men (even rapists).

In this connection, certain aspects of the law we properly condemned in *Griswold* are also worth highlighting. Like the Texas anti-abortion law before us today and the above-mentioned Texas rape-corroboration law, the Connecticut anti-contraception law in *Griswold* was adopted before women had the vote, and imposed serious risks on women–risks of unwanted pregnancy–that men did not bear. Indeed, the law specifically exempted contraceptive devices designed to prevent venereal disease. A condom was okay (as it might protect the man from unwanted infection), but a diaphragm was not (as it would only protect the woman from unwanted pregnancy). Thus, men could shield themselves from future disease, but women could not equally shield themselves from future dis-ease. (Pregnancy and childbirth are, as I have stressed, not exactly easy.) The Connecticut law entrenched traditional gender roles, implicitly treating women as baby machines and using their unique biology as a basis for legal disadvantage. I am worried that the Texas law may do the same thing.

No members of the *Griswold* Court even spotted the gender issue. No women sat on the

Court in *Griswold*. Only four years before *Griswold*, this Court unanimously upheld a Florida law that explicitly treated women differently from men and that predictably led to gross under-representation of women on juries–and not a single Justice so much as even mentioned the Nineteenth Amendment. See *Hoyt v. Florida*. All this is unfortunate, to say the least. And for me, it suggests that this Court should try to approach the issues in this case in a manner that invites women in general to make their voices heard: A conversation about women's rights needs to involve women themselves. (That is one of the reasons today's opinion should begin a dialogue with the American people, not end it.)

The Texas law itself was not the product of a dialogue in which women participated equally. It was adopted at a time when no woman voted. As I see it, this law should be judicially set aside for three interlocking reasons. *First, this law when enacted did not reflect women's equal input. Second, this law imposed and continues to impose serious and gender-specific burdens on women. And, third, this law continues to impose burdens that, by disrupting women's lives and careers, may make it less likely that they will be able to be full political equals in legislatures, judiciaries, and other positions of government power.*

My proposed framework of analysis builds upon the lessons of this Court's race cases. For example, my approach can help us to see, from yet another angle, the compelling rightness of *Brown v. Board of Education* and its companion cases. In those cases, it should be recalled, this Court confronted Jim Crow laws that: (a) when enacted generally did not reflect black's equal input (because blacks were widely disfranchised, often in unremedied violation of the Constitution); (b) imposed serious and race-based burdens on blacks denied the chance to associate on equal terms with more privileged whites; and (c) imposed exclusions that made it harder for blacks to participate as full political equals.

A critic of my approach might say that because women today can vote in Texas, the burden should be on them to repeal this law if they feel it in effect discriminates against them. See, for example, today's dissent by JUSTICE ROSEN. But I read the Nineteenth Amendment more broadly. This amendment sought to make amends. It sought to end a past practice of exclusion that was viewed as unfair, wrongful, erroneous. To the extent that the Texas law may well be a legacy of that wrongful era, we should not perpetuate it. We should wipe the slate clean for a new conversation involving men and women on equal footing.

A critic from the opposite direction might say that we Justices should decide the full meaning of women's equality for ourselves, rather than remanding the question to the Texas political process. This critic might be aghast at the idea of "putting constitutional rights up to a vote." This critic might even propose to go far beyond CHIEF JUSTICE BALKIN–say, by constitutionalizing a detailed regulatory grid based on pregnancy trimesters. But, to repeat, one way of respecting women's equality is for us Justices to pay particular attention to conversations in which women participate as equals–in a way that, alas, they do not yet do on this Court.

Such conversations need not be confined to the separate states. Congress itself may

choose to weigh in on behalf of women's rights in the context of pregnancy and abortion, as it has recently weighed in on behalf of women's rights in other areas. It bears emphasis that the Fourteenth Amendment vests Congress with sweeping, *McCulloch*-like powers to enforce the equal rights, freedoms, privileges, and immunities of women, and to safeguard those interests in the domains of pregnancy and abortion. See U.S Const. amend. XIV Sect. 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.") See also id. amend. XIX para. 2 (similar). In the event that Congress were to pass a woman-protective law that limited various state abortion statutes, this Court should treat Congress's enactment with great deference, in keeping with Section Five's words and its underlying history; Reconstruction Republicans plainly envisioned a role for Congress alongside courts in safeguarding American civil rights. (*The Civil Rights Cases* of 1883 do not properly stand in the way of such deference. These old and dubious cases have been superceded–indeed, implicitly overruled in part–by our more recent decisions in *Katzenbach v. Morgan* and *Jones v. Alfred Mayer, Co.*)

In Texas, and in other similarly situated states, the result of the new conversations I am envisioning may well be new laws that restrict some kinds of abortions in a variety of ways. These laws will probably at some point come before this Court for further review. Cf. *Furman v. Georgia*. And when they do, this Court may well confront a range of hard questions. Exactly what does equality demand on issues related to real biological difference, such as the capacity to become pregnant? Should it matter how many women are actually members of the legislature that adopts a new statute, and how they vote? If a state acts by initiative or referendum, in which presumably fully half of the voters would be female, should this fact count especially in its favor? More generally, what kind of standard of review is appropriate given that women are not a "discrete and insular minority"? See *Reed v. Reed*; cf. *United States v. Carolene Products*. (Note of course that this Court has yet to confront related issues about the proper judicial stance towards laws that seek to benefit rather than burden blacks and other historically disadvantaged racial minorities.)

I do not seek to anticipate and answer these and other questions today. For one thing, my views do not command a majority of the Court today, so nothing that I might add here would provide definitive guidance. More importantly, I have criticized the Court for going too far too fast today, in a manner that goes well beyond the facts of the Texas case before us. I must take care to avoid a similar mistake in this separate opinion. The issues surrounding women's equality, especially in the context of the unique and profound questions implicated by pregnancy, are multifarious. I expect to learn a great deal from the American people as this dialogue unfolds. And in turn, I hope that this dialogue may benefit from public attention to those aspects of the Constitution that genuinely do bear on the abortion question, especially the women's equality norms of the Fourteenth and Nineteenth Amendments.

II. *Doe v. Bolton*

Unlike the statute at issue in *Roe v. Wade*, supra, the Georgia law was passed only recently. Indeed, this law is so new that Georgia courts have yet to define some of its central

terms, or to consider possible state constitutional objections to it. I would therefore vacate the District Court's decision, and instruct that court to abstain from decision until the state courts have had an opportunity to weigh in. See *Railroad Commission of Texas v. Pullman Co.*

Contributor's Note

Although I have styled this imaginary concurrence/dissent as a response to the imaginary opinion of Chief Justice Balkin and fellow members of the fictional Balkin Court, in a few places, I have in effect alluded to Justice Blackmun's actual opinion in the real *Roe*. For example, my opening paragraph in Part I aims to remind the reader that in the real *Roe*, Justice Blackmun devoted considerable attention to the Hippocratic Oath and modern AMA pronouncements, while never so much as quoting the actual language of the Due Process Clause. In another passage, I borrow two words from Blackmun–namely, his concession that the abortion issue was *inherently different* from the issues addressed by previous cases. *Roe* at 159. And in passing, I criticize the real *Roe*'s rush to constitutionalize the trimester framework. Readers desiring to see my further thoughts about real *Roe* may wish to consult Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 749, 773-78 (1999) and Akhil Reed Amar, The Document and the Doctrine, 114 Harv. L. Rev. 26, 76, 109-114 (2000).

Many of the specific historical and textual claims summarized in my imaginary concurrence/dissent are elaborated elsewhere. In addition to the two above-cited articles, see generally AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

In discussing the fact that no women sat on the Court in *Griswold*, I was tempted to state explicitly that no women sat on the *Roe* Court either. However, I omitted this historically accurate truth from my concurrence/dissent in order to stay within the alternative universe of the imaginary Balkin Court, three of whose ten members are women.