WHAT

ROE v. WADE

SHOULD HAVE SAID

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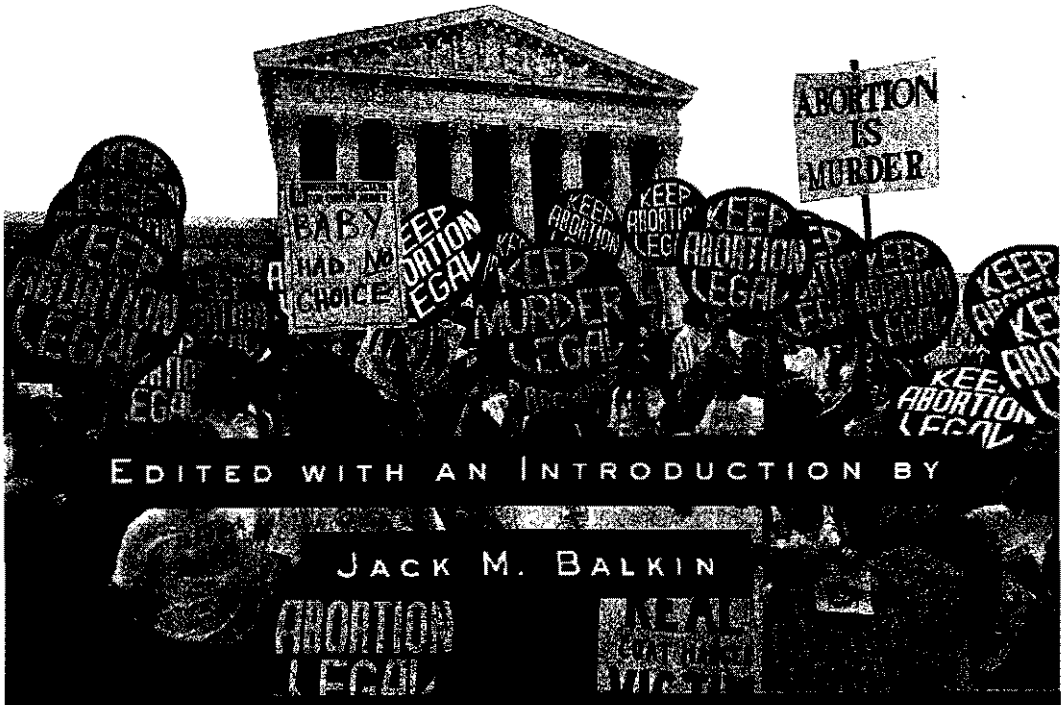

EDITED WITH AN INTRODUCTION BY

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Contents

SIEGEL, J., concurring.

I concur in the opinion of the Chief Justice holding the Texas and Georgia abortion statutes unconstitutional. I write separately to state what I understand to be the principal constitutional basis for that judgment.

Government has long regulated women's lives on the assumption that their family role made them different kinds of citizens from men. But what is customary is not always constitutional. Too often, laws that single women out for special treatment in virtue of their maternal role have excluded women from participating as equals with men in core activities of citizenship. As we have now come to understand it, the equal citizenship principle embodied in the Fourteenth and Nineteenth Amendments prohibits state action premised on traditional assumptions about the sexes that perpetuates second-class citizenship for women. For this reason, laws that regulate women's conduct as mothers warrant careful constitutional scrutiny. The criminal abortion statutes here in issue, which coerce pregnant women to perform the work of motherhood, do not survive such scrutiny. The statutes reflect and enforce traditional assumptions about the sexes, and can no longer be reconciled with the understanding that women are equal citizens with men.

Understandings of the equal citizenship principle evolve in history. In this opinion I demonstrate, first, that an emerging understanding of the equal citizenship principle warrants careful scrutiny of traditional modes of regulating women's conduct, and, second, that the criminal abortion statutes in issue violate this emergent understanding of the equal citizenship principle.

I.

Americans have long defined themselves as a people committed to values of liberty and equality. But the nation's understanding of those values has

shifted, quite substantially, over the centuries. At times these shifts in understanding occur incrementally and imperceptibly; at others, such changes have grown out of extended periods of national self-examination.

Debates over the meaning of the equal citizenship principle are the pride—the very life—of our constitutional tradition. Such debates can bring the community to question customs and traditions that seem to define it. For, as the nation has forged new understandings of its constitutional commitments, it has, from time to time, come to change institutions and practices that have long defined the community, in order to bring its ways of life in line with evolving understandings of its core constitutional values.

It was by reason of our willingness to wrestle with the meaning of our constitutional commitments and to reconsider entrenched practices in light of new understandings that we fought the great civil war that transformed this nation from a nation of slavery to a nation of freedom. It was by reason of our willingness to reconsider the meaning of our founding commitments that, after seventy-five years of debate, the nation amended its constitution to give half the adult population the right to vote.

We can see this practice of debate, reflection, and revision of constitutional understandings in our own day. One hundred years after the nation abolished slavery, the nation is still revising its understanding of how the equal citizenship principle governs state regulation of race. See *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669–70 (1966) (striking down Virginia's poll tax under the Equal Protection Clause):

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the Fourteenth Amendment commands. *Plessy v. Ferguson*, 163 U.S. 537. Seven of the eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear. When, in 1954—more than a half-century later—we repudiated the "separate-but-equal" doctrine of *Plessy* as respects public education, we stated: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written." *Brown v. Board of Education*, 347 U.S. 483, 492.

Moved by an evolving understanding of equal citizenship in matters of race, in the past several decades, this Court has interpreted the Fifth and Fourteenth Amendments to require governments to change traditional ways of regulating education, politics—even the family.[1] These same evolving understandings of equal citizenship prompted the President to order a reorganization of the military[2] and moved Congress to prohibit certain customary practices in the world of work, politics, housing, and public accommodations.[3]

We are now in just such a period of national struggle and reassessment about the meaning of equal citizenship values, not only as they bear on the great question of race in American life but also as they illuminate fundamental questions concerning relations between the sexes. Cf. *White v. Crook*, 251 F. Supp. 401, 406–7, 408 (M.D. Ala. 1966) (holding Alabama's exclusion of Negroes and of women from jury service unconstitutional) ("The argument that the Fourteenth Amendment was not historically intended to require the states to make women eligible for jury service reflects a misconception of the function of the Constitution and this Court's obligation in interpreting it. The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society."). These changes in the nation's understanding of the equal citizenship principle call into question practices long thought constitutional.

II.

At birth, this nation declared itself committed to values of liberty and equality, but its founders understood those commitments to apply variously to different adult members of the community. The founding generations tolerated or practiced slavery and understood marriage to vest men with near-total control over women's lives.

Public and private institutions of the early republic presumed that women were men's inferiors and dependents. Constitutional and common law rested on the assumption that dependency was a free woman's lifelong

estate, and that, as a young woman matured, she would move from the jurisdiction of her father to that of her husband. Thus, in all states, men barred women from voting, on the theory that male relatives would or should represent them.[4] The common law organized the institution of marriage to give husbands authority over their wives—authority to represent, to subject, and to discipline; the law secured this authority by giving husbands rights in their wives' real and personal property and in the value of their wives' labor. In nominal exchange, the common law gave wives the rights of a dependent: a right to support from their husbands that had no direct means of enforcement at law. 1 Blackstone, *Commentaries on the Laws of England,* 430–33 (1765) (describing the wife's loss of personal rights, the husband's right to discipline his wife, and his duty to support her) ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing."); 2 Blackstone, *Commentaries on the Laws of England,* 433–36 (1765) (describing the husband's acquisition of rights in his wife's property). Social practice buttressed this order of legally coerced dependency. Over the centuries, women were barred, first by custom and then by law, from serving in a variety of trades and occupations reserved to men; even today, women receive little more than half the pay of men who have equal educational attainment and perform similar work.[5] These constitutionally sanctioned laws and customs denied women the opportunity to support themselves and so only amplified the intense pressure on women to marry —a pressure only women of independent means might resist. See generally Leo Kanowitz, *Women and the Law: The Unfinished Revolution* (1969); John D. Johnson & Charles L. Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective," 46 *N.Y.U. L. Rev.* 675 (1971).

Systems of dominion are neither total nor stable, especially in a society as skeptical of aristocracy and status as is ours. See U.S. Const., art. I, § 9, cl. 8 (prohibiting titles of nobility). By the Civil War era, a nascent women's movement had begun to challenge this order of male privilege, invoking the magisterial cadences of the Declaration of Independence to do so. See 1 *History of Woman Suffrage* 70 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage, eds.) (1881) (reproducing the Declaration of Sentiments first delivered at the suffrage movement's inaugural Seneca Falls convention in 1848) ("We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their

Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed."). The nineteenth-century woman's rights movement protested both the common law of marital status and the constitutional order of male suffrage; by the war's end, the movement had claimed for women the right to vote and to practice law under the newly ratified Fourteenth Amendment. See 2 *History of Woman Suffrage* 407 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage, eds.) (1882) (account of the suffrage movement's "New Departure" in which women attempted to vote and enter professions under the Fourteenth Amendment). See also id. at 407–520 (reproducing constitutional argumentation before Congress); id. at 586–755 (reporting trials of women who attempted to vote under the Fourteenth Amendment).

These protests were successful initially in producing modest state law reform of marriage and, from this Court, an energetic defense of the status quo. In the immediate aftermath of the Civil War, this Court ruled that the exclusion of all women from the franchise was consistent with the basic principles organizing our constitutional order. *Minor v. Happersett,* 88 U.S. (21 Wall) 162, 177 (1874). Similarly, it upheld sex-based legislation restricting women's market opportunities as premised on the reasonable understanding that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." *Bradwell v. Illinois,* 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring). See also *Muller v. Oregon,* 208 U.S. 412, 422 (1908) ("Her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race —justify legislation to protect her from the greed as well as the passion of man.").

In time, however, the woman suffrage movement prevailed. Women persuaded those with power voluntarily to cede some of it, by emphasizing the principles of liberty and equality at the heart of our constitutional tradition, by appeal to the principle of self-representation for which the Revolution had been fought, and by appeal to the anticaste principle animating the nation's searing struggles over slavery. Nearly three-quarters of a century after the Seneca Falls convention, at which the movement first invoked the Declaration of Independence to protest male suffrage, We the People responded by amending the Constitution to provide that "The right of the 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." U.S. Const., amend. XIX, § 1. The suffrage amendment transformed constitutional assumptions about family and federalism that had endured since the founding. It broke with the premise of male household headship that had long justified women's disfranchisement and for the first time in constitutional history applied to women as a group the principles of self-representation and anticaste for which the Revolution and Civil War had been fought.

Yet, enfranchising women 150 years after the founding of the republic has not sufficed to confer upon them equality of citizenship in fact. Women may vote, but if we look to those spheres where citizens commonly participate in collective life—to the realms of politics, work, and education—we find that women do not hold positions of authority and often do not even participate, at times still by reason of express prohibition. More than half the nation's citizens are women, but there has never been a female president; no woman presently sits in the Senate, only fourteen sit in the House, and scarcely any have ever been appointed as judges. See Sassower, "Women in the Law: The Second Hundred Years," 57 *A.B.A. J.* 329, 330–31 (1971) (observing that there are three women serving as federal district judges and one woman who is a federal court of appeals judge). It is only ten years since Congress barred the practice of openly paying men and women different amounts for the same work (Equal Pay Act of 1963, 77 Stat. 56, 56–57, as amended, 29 U.S.C.S. § 206(d)). Sex lines in education and employment are common, and it is only in the past several years that we as a nation have begun to judge them wrongful. See Title IX of the Education Amendments of 1972, 86 Stat. 235, 373–75, 20 U.S.C.S. §§ 1681 et seq. (prohibiting sex discrimination in all education programs that receive federal funds); *Mengelkoch v. Industrial Welfare Commission*, 442 F.2d 1119 (9th Cir. 1971) (holding that the question of whether a California statute limiting the number of hours women could work violated equal protection posed a substantial constitutional question, thereby justifying a three-judge panel); *Sail'er Inn, Inc. v. Kirby*, 5 Cal.3d 1, 20 (Cal. 1971) (invalidating under the Equal Protection Clause a California law prohibiting women from working as bartenders) ("Laws which disable women from full participation in the political, business and economic arenas are often characterized as 'protective' and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage."); Equal Employment Opportunities Commission Guidelines, 29 C.F.R. § 1604, 2(b) (amended in 1969 to declare states' protective labor legislation in conflict with Title VII) ("The commission has found that such laws . . . do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect"). As this society begins to question long-standing traditions, stereotypical assumptions about the roles of men and women that for centuries justified women's disfranchisement and subordination in marriage continue to shape institutions and practices in the public and private spheres.

It was with the understanding that the vote was but the first step toward true equality of citizenship that women across the nation joined in a strike for equality on August 26, 1970, the half-century anniversary of the Nineteenth Amendment's ratification. The strike emphasized that an equal right to vote has not sufficed to make women equal citizens with men. See Linda Charlton, "Women March Down Fifth Avenue in Equality Drive," *New York Times*, Aug. 27, 1970, p. 1. To realize the Nineteenth Amendment's promise, the nation would have to extend the principles of liberty and equality on which the Amendment was based and repudiate understandings and practices that had developed during the long period when the nation thought it reasonable to treat women as dependent, disenfranchised citizens. The strike memorialized ratification of the suffrage amendment with the message that women will not have an equal opportunity to participate in the core activities of citizenship—education, employment and politics—until the nation transforms the conditions in which women bear and rear children. With this understanding, the strike sought ratification of the Equal Rights Amendment now before the states, and three interlocking reforms: equal opportunity in education and work, as well as rights to child care and rights to abortion that would enable women to avail themselves of these new opportunities. Id. at 1, 30; see also 116 Cong. Rec. S22,216–17 (June 30, 1970) (printing Margaret Crimmins, "Drum-Beating for Women's Strike," *Wash. Post*, June 30, 1970, at D3).

The President responded by establishing the President's Task Force on Women's Rights and Responsibilities, a committee charged with "review-[ing] the present status of women in our society and recommend[ing] what might be done in the future to further advance their opportunities." 117 *Cong. Rec.* S30,158, (1971) (recommending the enactment of antidiscrimination legislation and reform of child care, including "[a]doption of the liberalized provisions for child care in the family assistance plan and authorization of Federal aid for child care for families not covered by

the family assistance plan"). As the President recently observed on the anniversary of the Nineteenth Amendment's ratification: "As significant as the ratification of the Nineteenth Amendment was, it was not cause for ending women's efforts to achieve their full rights in our society. Rather, it brought an increased awareness of other rights not yet realized." Presidential Proclamation No. 4147, reprinted in 8 *Weekly Comp. Pres. Doc.* 1286, 1286–87 (Aug. 26, 1972).

Congress, too, has responded. It has reaffirmed the nation's commitment to the equal citizenship principle and signaled the nation's determination to ensure that women are equal participants in all spheres of civic life. A decade ago, it passed the Equal Pay Act of 1963, which provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of sex." 77 Stat. 56, as amended, 29 U.S.C.S. § 206 (d). See generally Thomas E. Murphy, "Female Wage Discrimination: A Study of the Equal Pay Act 1963–1970," 39 *U. Cin. L. Rev.* 615 (1970). And, in enacting Title VII of the Civil Rights Act of 1964, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." 78 Stat. 253, 42 U.S.C.S. § 2000e et seq.

Congress is now acting steadily to extend these commitments. The Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "(e)quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J.Res. No. 92-208 (1972). And when Congress used its power to enforce the Fourteenth Amendment to apply the employment discrimination provisions of the Civil Rights Act of 1964 to the states, it took special care to emphasize the urgency of combating sex discrimination. Equal Employment Opportunity Act of 1972, 86 Stat. 103, 103; H.R. Rep. No. 92-238, at 5 (1971), reprinted in 1972 U.S.C.C.A.N. 2137, 2141 ("Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination."); see also S. Rep. No. 92-415, at 7–8 (1971). This same Congress prohibited sex discrimination in all educational programs that receive federal funds, Title IX of the Education Amendments of 1972, 86 Stat. 235, 373–75, 20 U.S.C.S. §§ 1681 et seq., and enacted a wide variety of statutes that prohibit sex discrimination in public- and private-sector transactions.[6] In this same session, Congress embarked upon the

project of alleviating conflicts between work and family by enacting a tax credit for child care expenses. Revenue Act of 1971, 85 Stat. 497, 518–20, (allowing working parents with combined incomes of up to $18,000 a year to take tax deductions for child care of up to $400 a month and those with combined incomes above $18,000 to take a more modest deduction). Thus, Congress itself has concluded that the equal citizenship principle requires the nation to change customary ways of organizing relations between the sexes, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration. Cf. *Oregon v. Mitchell*, 400 U.S. 112, 248–49 (1970) (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part); *Katzenbach v. Morgan*, 384 U.S. 641, 648–49 (1966).

As an evolving understanding of the equal citizenship principle has moved Congress to review and to prohibit certain practices that have long organized relations between the sexes, so, too, has this Court recognized that the nation's conception of equal citizenship requires scrutiny of traditional practices rooted in stereotypical assumptions about the roles of men and women. In *Reed v. Reed*, 404 U.S. 71 (1971), we held that an Idaho statute that preferred males over similarly situated females as administrators of a family member's estate violated the Fourteenth Amendment. Because the state statute "provides that different treatment be accorded to the applicants on the basis of their sex," we held, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." Id. at 75. As our decision in *Reed* and the recent actions of Congress show, the nation's commitment to the principle of equal citizenship embodied in the Fourteenth and Nineteenth Amendments requires careful scrutiny of practices that enforce traditional assumptions about the sexes or that perpetuate second-class citizenship for women.

III.

Accordingly, legislation that criminalizes abortion requires careful scrutiny to determine whether it conforms to principles of equal citizenship under the Fourteenth and Nineteenth Amendments.

Laws that regulate the conduct of pregnant women warrant careful scrutiny because they distribute benefits and burdens on the basis of sex. This is so, even if the regulation concerns a condition that affects some, but not all, women. Cf. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542

(1971) (holding that a policy prohibiting employment of women, but not men, with pre-school-age children discriminates on the basis of sex in violation of Title VII). We scrutinize state action that regulates pregnancy as sex-based because most women, and no men, have the capacity to bear children, and so regulation of pregnancy is prone to bias, in impetus and impact. See *Cohen v. Chesterfield County School Bd.*, 4 Fair Empl. Prac. Cas. (BNA) (4th Cir. 1972) (holding that mandatory maternity leave policy is sex-based discrimination subject to equal protection scrutiny) ("Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.") (quoting *Phillips v. Martin Marietta Corp.*, 416 F.2d 1257, 1259 (5th Cir. 1969) (dissenting from denial of motion for rehearing en banc)). The fact that a law concerns a real physical difference between the sexes does not save it from searching review; physical differences between the sexes, in particular a women's unique capacity to gestate life, occasion some of the most persistent and deep-rooted assumptions about the different roles and worth of men and women. See *Heath v. Westerville Bd. of Educ.*, 345 F. Supp. 501, 505 n.1 (S.D. Ohio 1972) (relying on *Reed* to invalidate regulations requiring termination of employment at a fixed stage of pregnancy) ("[D]efendant Board's treatment of pregnancy . . . is more a manifestation of cultural sex role conditioning than a response to medical fact and necessity. The fact that [the plaintiff] does not fit neatly into the stereotyped vision . . . of the 'correct' female response to pregnancy should not redound to her economic or professional detriment."); *Williams v. San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972) (relying on *Reed* to hold that mandatory maternity leave policy violated equal protection); cf. *Sprogis v. United AirLines*, 444 F.2d. 1194, 1198 (7th Cir. 1971) (interpreting sex-discrimination provisions of Title VII) ("Discrimination is not to be tolerated under the guise of physical properties possessed by one sex.").

Because state regulation of pregnant women is sex-based state action, when the state distributes benefits and burdens on the basis of pregnancy, it must act in ways that are consistent with the equal citizenship principle: wives and mothers are entitled to participate in education, work, and politics on the same terms as husbands and fathers. Thus, regulation aimed at pregnant women may not be premised on stereotypical assumptions about the sexes or perpetuate second-class citizenship for women, and the state may no longer regulate pregnant women on the

assumption that mothers participate in the activities of citizenship on different terms than do men.[7] See *LaFleur v. Cleveland Board of Education*, 465 F.2d 1184 (6th Cir. 1972) (holding invalid under the Equal Protection Clause a school board rule that required pregnant teachers to take an unpaid leave of absence that would begin five months before birth and end at the beginning of the first school term after the child was three months old). Justifications this Court once held to be reasonable grounds for restricting the life opportunities of women are no longer constitutionally sufficient.

Once, members of this Court asserted that "the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (Bradley, J., concurring.) Interpreting our constitutional commitments on the assumption that a woman's family role unsuited her for the pursuits of citizenship in which men engaged, this Court concluded that the Fourteenth Amendment provided no protection against state laws that singled out women for restrictions on their employment. *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) (ruling that such legislation was warranted in view of a woman's "physical structure and a proper discharge of her maternal functions") ("The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, . . . the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her."). Consistent with this understanding of family roles, the nation excluded women from equal participation in education, in work, and in politics, and organized the realms of work, education, and politics on the premise that those who participate in the core pursuits of citizenship are unburdened by obligations of family care.

Americans continue to value and to esteem the labor women perform as wives and mothers; yet, as the recent actions of all branches of government testify, Americans no longer deem it acceptable to define and to limit women's life opportunities on the assumption that a woman's family role makes her a different kind of citizen from a man. This change in the understanding of women's role requires us to reconsider traditional restrictions on women's conduct to determine whether they are consistent with prevailing understandings of the equal citizenship principle. Justifications

for restricting access to abortion thought reasonable in a world that viewed men and women as citizens who live in separate spheres may not satisfy constitutional requirements today.

Today, as we have seen, the state cannot regulate pregnant women on the assumption that women's role as mothers unfits them for education, employment, or politics or requires them to participate in the activities of citizenship on terms different from those that apply to men. Yet, criminal abortion statutes were enacted on just this assumption: the assumption that women were obliged to devote themselves to the work of raising children in a way that men were not.

At common law, abortion was legal until quickening, a pregnant woman's first perception of fetal movement, and the practice of contraception was wholly unregulated.[8] All this changed in the mid-nineteenth century, when doctors of the newly formed American Medical Association advocated the passage of legislation that would criminalize contraception and abortion.

Doctors invoked a set of interlocking arguments about human reproduction to justify these new legal controls on contraception and abortion —claims about women and the unborn life they might bear. The leader of the criminalization campaign invoked the authority of medical science to argue that life begins at conception: "The first impregnation of the egg, whether in man or in kangaroo, is the birth of the offspring to life; its emergence into the outside world for a wholly separate existence is, for one as for the other, but an accident in time." Horatio Robinson Storer, *Why Not? A Book for Every Woman* 31 (1866) (hereinafter *Why Not?*). He also invoked the authority of medical science when he asserted that a woman had a duty to procreate that was dictated by her anatomy:

> Were woman intended as a mere plaything, or for the gratification of her own or her husband's desires, there would have been need for her of neither uterus nor ovaries, nor would the prevention of their being used for their clearly legitimate purpose have been attended by such tremendous penalties as is in reality the case.

Id. at. 80–81.

It was because the medical profession acted from beliefs about women as well as the future generations they might bear that doctors opposed contraception, as well as abortion. Physicians who advocated the criminalization of abortion and contraception argued that a woman who shirked her duty to bear children committed "physiological sin." H. S. Pomeroy, *The Ethics of Marriage* 97 (New York, Funk & Wagnalls 1888). The only way that a wife could ensure her health was to bear children, pregnancy being "a normal physiological condition, and often absolutely necessary to the physical and moral health of woman." Edwin M. Hale, *The Great Crime of the Nineteenth Century* 6n (Chicago, C. S. Halsey 1867). As Storer explained:

> Is there then no alternative but for women, when married and prone to conception, to occasionally bear children? This, as we have seen is the end for which they are physiologically constituted and for which they are destined by nature. . . . [The prevention and termination of pregnancy] are alike disastrous to a woman's mental, moral, and physical wellbeing.

Horatio Robinson Storer, *Why Not?* 74–76; see also Horatio Robinson Storer, *Is It I? A Book for Every Man* 115–16 (Boston, Lee & Shepard 1868) ("Every married woman, save in very exceptional cases, which should only be allowed to be such by the decision of a competent physician, every married woman, until the so-called turn in life, should occasionally bear a child; not as a duty to the community merely . . . but as the best means of insuring her own permanent good health.")

Thus, physicians arguing for the criminalization of abortion reasoned that life begins at conception, but their judgments about abortion were equally and explicitly premised on the view that a woman's anatomy was her destiny, that a woman's highest and best use was in bearing children. The doctors viewed all of women's reasons for seeking an abortion as equally and unnaturally egoistic because all were derogations of maternal duty, as Augustus Gardner explained: "Is it not arrant laziness, sheer, craven, culpable cowardice, which is at the bottom of this base act? . . . Have you the right to choose an indolent, selfish life, neglecting the work God has appointed you to perform?" Augustus K. Gardner, Physical Decline of American Women, reprinted in Augustus K. Gardner, *Conjugal Sins Against the Laws of Life and Health* 225 (New York, J. S. Redfield 1870). The AMA's 1871 *Report on Criminal Abortion* denounced the woman who aborted a pregnancy: "She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures—but shrinks from the pains and responsibilities of maternity." D. A. O'Donnell and W. L. Atlee, Report on Criminal Abortion, 22 *Transactions of the AMA* 239, 241 (1871). Thus,

the same doctors who invoked medical science to condemn abortion as "foeticide" at one and the same time condemned the practice as violating women's roles:

> Woman's rights and woman's sphere are, as understood by the American public, quite different from that understood by us as Physicians, or as Anatomists, or Physiologists.
>
> "Woman's rights" now are understood to be, that she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making.
>
> The whole country is in an abnormal state, and the tendency to force women into men's places, creates new ideas of women's duties, and therefore . . . the marriage state is frequently childless. . . . These influences act and react on public sentiment, until the public conscience becomes blunted, and duties necessary to women's physical organization are shirked, neglected, or criminally prevented.

Montrose A. Pallen, "Foeticide, or Criminal Abortion," 3 *Medical Archives* 193, 205–6 (1869) (paper read before the Missouri State Medical Association, April 1868).

The nation no longer credits the belief that men and women occupy separate spheres and roles, and yet the role concepts the separate-spheres tradition fostered continue to play an implicit and sometimes explicit part in judgments about abortion. As a nation, we still expect men and women differently to comport themselves in matters concerning sex and parenting, and these judgments play a large part in determining whether and when abortion is acceptable. Today, it is commonly assumed that the question of abortion depends on judgments about unborn life; yet, views about the acceptability of the practice in fact vary with judgments about the sexual relations in which unborn life was conceived and the reasons and activities that might lead women to avoid motherhood. Thus, instead of demonstrating a consistent valuation of unborn life across contexts, societal judgments about abortion depend on views about the women at whom regulation is aimed. This is all the more evident in more recent therapeutic abortion statutes that make the permissibility of abortion explicitly dependent on medical evaluation of women's reasons for avoiding motherhood.

For example, the liberalized criminal abortion statute proposed by the Model Penal Code authorizes a physician to perform an abortion "if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with gave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse." Model Penal Code § 230.3(2). (Georgia's statute follows this model; it allows abortions where a physician determines "based upon his best clinical judgment that an abortion is necessary because" "[a] continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health" or "[t]he fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect" or "[t]he pregnancy resulted from forcible or statutory rape." Ga. Code § 26-1202(1)–(3)).

The statutory exception allowing women to have abortions if they conceive by rape indicates that the state's decision to prohibit abortion rests on unarticulated assumptions about how women are to comport themselves sexually—a code the state enforces by selectively allowing women access to abortion. What are the terms of this code? By long-standing common law tradition, states do not apply the law of rape between husband and wife.[9] And so, by law, a husband may rape his wife, and after he has forced her to have sex, the state will force her to bear the child. When criminal abortion statutes with rape exceptions incorporate these traditions, they enforce judgments about married women like those expressed in the nineteenth-century record. The rape exception carries forward norms of sexual comportment in other ways. Rape exceptions of this kind express and perpetuate a sexual double standard. States will punish pregnant women who have "voluntarily" engaged in sex by making them bear children, even though the state has imposed no similar duties, burdens, or sanctions on the men who were coparticipants in the act of conception. The state does not hold the pregnant woman's partner accountable for sharing the work of parenting, nor does it alter the sex-based citizenship consequences of performing the work: during pregnancy and then for some two decades after, a woman will face severe restrictions on her ability to participate in education, employment, or politics—restrictions the society is only now beginning to ameliorate.

Traditional sex-role assumptions also shape the exception that allows abortions to save the pregnant woman's life or to prevent serious and permanent injury to her health. As we have seen, criminal abortion statutes

enforce the sex-role understanding that a pregnant woman is a mother, one who is expected to devote her life to rearing children in ways men are not. The therapeutic exception extends this tradition. While criminal abortion statutes compel a pregnant woman to subordinate her welfare to that of the unborn, the therapeutic exception indicates that the state will subordinate the welfare of the unborn to that of the pregnant woman when the state judges the woman's reasons for avoiding motherhood sufficiently weighty. The state will allow a pregnant woman to avoid motherhood only when she is at risk of losing her mind or health. The therapeutic standard for abortions thus defines women as childbearers just as thoroughly and completely as the nineteenth-century medical profession did. Cf. Eugene Quay, "Justifiable Abortion," 49 *Geo. L.J.* 173, 234 (1961) (criticizing therapeutic exception to criminal abortion laws) ("A mother who would sacrifice the life of her unborn child for her own health is lacking in something. If there could be any authority to destroy an innocent life for social considerations, it would still be in the interests of society to sacrifice such a mother rather than the child who might otherwise prove to be normal and decent and an asset."); Elizabeth Truninger, "Abortion: The New Civil Right," 56 *Wom. Lawyer's J.* 99, 99–100 (1970) ("But under even the Therapeutic Abortion Law, a woman often must be determined crazy if she does not wish to bear the child she carries. Much of this thinking can be traced to society's limited perception of women's role solely as a mother.").

In other words, today, no less than in the nineteenth century, regulation of abortion reflects judgments about women, as well as the unborn life they bear. As we have seen, the statutes' design reflects sex-role assumptions about conception and parenting and is surely not dictated by the physiology of reproduction. To illustrate this in yet a different way: A state that criminalizes abortion to protect the unborn could nonetheless compensate or assist the pregnant woman on whom it would impose motherhood. Why, then, is it that no abortion law enacted in the United States has ever offered assistance to pregnant women in coping with the consequences of gestating and raising the children that the state has forced them to bear? That no state has attempted to ameliorate the effects of two decades of life-transforming labor that a criminal abortion statute exacts from women demonstrates that criminal prohibitions on abortion still embody judgments about the women whose conduct the statutes regulate —judgments that can be understood by considering the views expressed by the statutes' original proponents, who viewed motherhood as "the end

for which [women] are physiologically constituted and for which they are destined by nature." Horatio Robinson Storer, *Why Not?* 76.

Abortion statutes like those in Texas and Georgia not only reflect status-role judgments about women; they inflict status-role harms on women. As we have seen, such statutes do not compensate or assist the pregnant woman on whom they would impose motherhood but instead compel women to assume the role of motherhood in a society that penalizes women if they do not perform the work of motherhood as a legal and social dependent of a man. As amici observe:

> A woman who has a child is subject to a whole range of *de jure* and *de facto* punishments, disabilities and limitations to her freedom from the earliest stages of pregnancy. She may be suspended or expelled from school and thus robbed of her opportunity for education and self-development. She may be fired or suspended from her employment and thereby denied the right to earn a living and, if single and without independent income, forced into the degrading position of living on welfare.
>
> In Texas, a father of an out-of-wedlock child has neither the common law nor the statutory duty to support his child. *Home of Holy Infancy v. Kaska*, 397 S.W. 2d 208 (Tex. 1965). See also *Lane v. Phillips*, 6 S.W. 610 (Tex. 1887), *Beaver v. State*, 256 S.W. 929 (Cr. App. Tex., 1923). Having been forced to give birth to a child she did not want, a woman may be subject to criminal sanctions for child neglect, e.g., D.C. Code §22-902, if she does not care for the child to the satisfaction of the state. In some states even here the disabilities for the woman are greater than for the man. Of course, again, if the woman is unmarried and paternity was never legally established, the woman bears these legal burdens alone. Even where the father is present, social mores and expectations dictate that, in the overwhelming majority of cases, the mother rather than father will be primarily responsible for raising the children.

Brief of Amici Curiae New Women Lawyers et al. at 24, 29, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). These practices are mutually reinforcing, long-standing, and widespread. Women who by choice or circumstance do not conform to these sex-role assumptions experience pregnancy and motherhood as a profound threat that will expose them to unending sanction and to denigration and deprivation, with untold injury to themselves and to children they have or might bear. For this reason, there are "[a]n estimated 1,000,000 illegal abortions [that] take place in the country

annually, usually at the hands of unqualified practitioners. Thousands of the women so aborted suffer permanent injury and some death." Lorry Plagenz, "States Legislate Abortion Reform, But Hospitals Are Reluctant to Comply," *Modern Hospital* 82, 85, July 1969.[10]

Abortion statutes such as Texas's and Georgia are sex-biased in impetus and impact, and these constitutional debilities of the statutes do not dissipate by emphasizing that the statutes vindicate an interest in protecting unborn life. There might come a day in which this society consistently expressed its concern about the welfare of future generations in a way that is not dependent on and entangled with judgments about the citizens who conceive and raise them. We do not now live in such a society. Rather than valuing unborn life consistently, states instead condemn abortion selectively, in ways that vary with judgments about the women at whom the prohibition is aimed. Rather than assist or compensate women whom they would compel to bear children, states with criminal abortion statutes treat women who gestate and raise future generations as dependents and second-class citizens, persons who can be expected (or forced) to devote their lives to others, and penalized if they endeavor to live autonomously. States may so act, but if they do so, they cannot expect their laws to be judged as if they simply expressed respect for the value of unborn life. The criminal abortion laws here in issue do much more; they reflect and enforce traditional, status-based judgments about women of a sort once openly voiced when the statutes were first enacted but now no longer acceptable to express because inconsistent with the nation's evolving understanding of equal citizenship.

We base judgments about the statutes' constitutionality on the structure of abortion laws as they have been enacted and enforced, not on some idealization of the regulation that omits constitutionally salient features of its actual practice. For this reason, it does not advance the case for constitutional justification to call abortion murder. Criminal abortion statutes enacted in the past century have *not* regulated abortion as murder. Whatever respect for unborn life abortion laws express, state criminal laws have never valued unborn life in the way they value born life. States have never treated women who seek to abort a pregnancy as they would a woman who was seeking to murder a born person. States have not used the criminal law to incarcerate women who obtain or attempt to obtain an illegal abortion. Instead, they have used the criminal law to coerce and intimidate women into performing the work of motherhood. In judging the constitutionality of such laws, we examine the social understandings the laws reflect and enforce. Abortion laws do not treat women as murderers, but as *mothers*[11]—citizens who exist for the purpose of rearing children, citizens who are expected to perform the work of parenting as dependents and nonparticipants in the citizenship activities in which men are engaged. States that wish to protect unborn life must do so in ways that do not use the power of the state to enforce sex-differentiated roles and responsibilities in matters of sex and parenting.

For these reasons, abortion restrictions of the sort contained in the Texas and Georgia statutes violate equal citizenship guarantees of the Fourteenth and Nineteenth Amendments. "Restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact that men are unable to see women in any role other than that of mother and wife." Brief of Amici Curiae New Women Lawyers et al. at 24, 32, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).[12] The history and structure of such laws "reflect[] arbitrary notions of a woman's place wholly at odds with contemporary legislative and judicial recognition that individual potential must not be restrained, nor equal opportunity limited, by law-sanctioned stereotypical prejudgments." Brief for Petitioner at 7, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178). "[T]he Nineteenth Amendment sought to reverse the previous inferior social and political position of women: denial of the vote represented maintenance of the dividing line between women as part of the family organization only and women as independent and equal citizens in American life. [But] abortion laws, in their real practical effects, deny the liberty, and equality of women to participate in the wider world, an equality which is demanded by the Nineteenth Amendment." First Amended Complaint at 6–7, *Women of Rhode Island v. Israel* (D.R.I. June 22, 1971) (No. 4605).[13] Such statutes violate the equal citizenship principle because they compel pregnant women to assume the role and to perform the work of motherhood, without acknowledgment or recompense, in a society still organized on the understanding that those who do the primary work of bearing and rearing children are a dependent class, not full participants in those activities that the society most highly values and centrally associates with citizenship. And, "as long as women are unable to control their reproductive lives they will be forced to disrupt their education, forgo their career, and will never be a totally functioning part of the government which determines [their] rights." Brief of Amici Curiae New Women Lawyers et al. at 24, 32, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

Now as before, individuals may form their own judgments about the

morality of abortion and determine when, if ever, they believe recourse to the practice appropriate. But they may not invoke the power of the state to make such choices for others. The community may not invoke the power of the state to appropriate the life of one of its citizens for the purpose of making another, all the more so when such coercion perpetuates a network of understandings and practices that treats those who rear children as second-class citizens.

Freely undertaken, motherhood remains a profound source of fulfillment and pride for women, despite its many burdens. Women may choose to perform the work in reliance on the support of another, or they may struggle to support themselves and their children in a world that penalizes those who do the work of gestating and raising children. But these are choices that the Constitution protects as the woman's alone. Given the way this nation has historically treated citizens who bear and rear children—a history that still powerfully shapes attitudes and practices in America today—government may give support to pregnant women, but it may not coerce them to give birth.

For these reasons, government may not deny women effective access to abortion, and all regulation of the practice must be consistent with principles of equal citizenship.

NOTES

1. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that state policies maintaining segregation in public education violate the Fourteenth Amendment's Equal Protection Clause); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (ruling that segregation in public schools is unconstitutional under the Fifth Amendment's Due Process Clause); *Anderson v. Martin*, 375 U.S. 399 (1964) (holding that a Louisiana statute that mandated the designation of a candidate's race on election ballots violated equal protection because it enlisted the power of the state to enforce private racial prejudices); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down criminal prohibitions on interracial marriage).

2. See Exec. Order No. 9981 (1948), 3 C.F.R. 722 (1941–1948) (ordering desegregation of the military and requiring equality of opportunity regardless of race or national origin).

3. See Title II and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, (1964), 42 U.S.C.S. §§ 2000a et seq. (prohibiting discrimination on the basis of race in public accommodations and employment); Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C.S. § 1973 (barring abridgement of the right to vote on the basis of race); Civil Rights Act of 1968, 82 Stat. 81, 42 U.S.C.S. §§ 3601–3631 (banning discrimination on the basis of race in the sale and rental of real estate).

4. Women were not allowed to vote anywhere except in New Jersey, which adopted qualified suffrage for women at the nation's founding and retained it for several decades. While the state constitution referred to property ownership and not to sex, married women's limited property rights effectively limited the franchise to single women with some property. This unique period of woman suffrage lasted until 1807, when it was ended by an act of the legislature. See generally Richard P. McCormick, *The History of Voting in New Jersey: A Study in the Development of Election Machinery, 1664–1911* (1953); J. R. Pole, "Suffrage Reform and the American Revolution in New Jersey," 74 *Proceedings of the N.J. Hist. Scty.* 173 (July 1956).

5. See *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 139 (1872) (upholding the constitutionality of a state's exclusion of women from the practice of law); *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) (upholding the constitutionality of state laws imposing sex-based restrictions on the terms and conditions of employment); Eliot A. Landau & Kermit L. Dunahoo, "Sex Discrimination in Employment: A Survey of State and Federal Remedies," 20 *Drake L. Rev.* 417, 420 (1971).

6. See, e.g., Comprehensive Health Manpower Training Act of 1971, Pub. L. No. 92-157, sec. 110, § 799a, 85 Stat. 431, 461, and the Nurses Training Act of 1971, Pub. L. No. 92-158, sec. 11, § 845, 85 Stat. 465, 479–80 (amending Titles VII and VIII of the Public Health Services Act to prohibit sex discrimination in admissions to all training programs for health professionals receiving funds under these Titles); Act of Oct. 14, 1972, Pub. L. No. 92-496, § 3, 86 Stat. 813, 813–14 (expanding the mandate of the U.S. Commission on Civil Rights, a study group on minority problems established by Congress in 1957, to include sex discrimination); Act of Dec. 15, 1971, Pub. L. No. 92-187, §§ 1–3, 85 Stat. 644, 644 (amending §§ 2108, 5924, and 7152 of Title 5 of the United States Code so as to equalize employment benefits for married female federal employees); Revenue Sharing Act of 1972, Pub. L. No. 92-512, § 122, 86 Stat. 919, 932 (prohibiting discrimination on the basis of sex in the disbursement of federal funds for fiscal assistance to state and local governments); Act of Aug. 5, 1971, Pub. L. No. 92-65, §§ 112, 214, 85 Stat. 166, 168, 173 (prohibiting sex discrimination in access to all programs or activities funded under the Public Works and Economic Development Act of 1965 and the Appalachian Regional Development Act of 1965); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 13, 86 Stat. 816, 913 (prohibiting sex discrimination in any program or activity receiving federal funds under the Federal Water Pollution Control Act or the Environmental Financing Act).

7. It is for this reason that the EEOC has recently issued regulations protecting pregnant employees against discrimination on the job. See E.E.O.C. Guidelines on Sex Discrimination, 29 C.F.R. 1604.10 (1972) ("A written or unwritten employment policy or practice which excludes from employment applicants or employees

because of pregnancy is in prima facie violation of Title VII."); see also Office of Federal Contract Compliance Sex Discrimination Guidelines, 41 C.F.R. 60-20.3 (g) (applicable to employers performing federal contracts) ("Women shall not be penalized in their conditions of employment because they require time away from work because of childbearing"); Department of Health, Education, and Welfare Higher Education Guidelines 12–13 (October 1972) (prohibiting discrimination against pregnant women); see generally Comment, "Love's Labors Lost: New Conceptions of Maternity Leaves," 7 *Harv. Civ. Rts. Civ. Libs. L. Rev.* 260 (1972); Walter J. Curran, "Equal Protection of the Law: Pregnant School Teachers," 285 *New England J. Med.* 336 (1971).

8. E. Coke, Institutes III 50 (1644); 1 W. Hawkins, *Pleas of the Crown*, c. 31, § 16 (4th ed. 1762); 1 W. Blackstone, *Commentaries on the Laws of England* 129–30 (1765); M. Hale, *Pleas of the Crown* 433 (1st Amer. ed. 1847). For discussions of the role of the quickening concept in English common law, see L. Lader, *Abortion* 78 (1966); J. Noonan, "An Almost Absolute Value in History," in *The Morality of Abortion* 223–26 (J. Noonan ed. 1970); Cyril C. Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality (pt. 1)," 14 *N.Y.L.F.* 411, 418–28 (1968); Loren G. Stern, "Abortion: Reform and the Law," 59 *J. Crim. L.C. & P.S.* 84 (1968); Eugene Quay, "Justifiable Abortion—Medical and Legal Foundations, (pt. 2)," 49 *Geo. L.J.* 395, 430–32 (1961); G. Williams, *The Sanctity of Life and the Criminal Law* 152 (1957).

9. American jurisdictions recognize a marital rape exemption, whether in express statutory or implied terms; see Comment, "Rape and Battery between Husband and Wife," 6 *Stan. L. Rev.* 719 (1954); Annot., 84 A.L.R.2d 1017 (1962) (discussing continuing adherence to marital rape exemption)—a centuries-old tradition recently reaffirmed by the Model Penal Code. See Model Penal Code. § 213.1 ("A male who has sexual intercourse with a female not his wife is guilty of rape if; . . .").

10. The social judgments that shape attitudes about pregnant women and the practice of abortion lead this society to discriminate among women, even in determining whom it will protect from the trauma and risk of illegal abortion. Women of means have far greater access to legal abortion, with recent studies demonstrating that the average number of hospital abortions done for private patients was 7.1 per year, while the average for nonprivate patients was 1.7 a year. Id. For these reasons, of the nonhospital abortion deaths that occurred in Georgia between 1950 and 1969, 69 percent occurred among black women. Roger W. Rochat, Carl W. Tyler, Jr., & Albert K. Schoenbucher, "An Epidemiological Analysis of Abortion in Georgia," 61 *AJPH* 542, 542, 543 (1971). ("Abortion mortality from nonhospital abortions in Georgia is becoming increasingly a black health problem; presumably, this reflects the lower socio-economic status of blacks in Georgia.") Even with liberalization of abortion in Georgia, before and after its codification in law, this problem persists; mortality "has declined among whites and married black women, [it] has remained high for unmarried black women." Id. at 549. These public health statistics illustrate, yet again, how judgments about women determine access to abortion.

11. For example, until Georgia's recent overhaul of its criminal laws in light of the Model Penal Code, the Georgia code grouped, and distinguished, abortion and infanticide. See Ga. Code § 26-11 ("Abortion, Foeticide and Infanticide"), repealed, Ga. Laws 1968, p. 1338. In addition, the Model Penal Code, which has revolutionized criminal laws across the nation, groups abortion among "crimes against the family," distinguishing it from the companion crimes of bigamy, incest, child endangerment, and persistent nonsupport of a child. Model Penal Code, Article 230 "Offenses against the Family," §§ 230.1–230.5.

12. Elizabeth Truninger, "Abortion: The New Civil Right," 56 *Wom. Lawyer's J.* 99, 99–100, 101 (1970) ("Much of this thinking [about abortion] can be traced to society's limited perception of women's role solely as a mother.") ("It is not surprising then that the legal arguments being made are that the abortion law denies equal protection and abridges the women's constitutional right to life and to decide whether to bear children. Actions have been filed in many places throughout the country challenging the constitutionality of abortion statutes . . . on these grounds.")

13. See William Hodes, "Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment," 25 *Rutgers L. Rev.* 26, 51 (1970) (arguing "that the 19th amendment really had very little to do with the vote, but instead established the total equality of women and men . . . under such an interpretation, one need only demonstrate that a certain practice discriminates against women as a class, or that it is a badge and an indicia of the pre-1920 status of second-class citizen, in order to find primary corrective power in the national government") ("Since the binding of women to the home is the real basis for the inferior position of women in our society, and since it is where the traits of slavery are still most visible, it is not surprising to find that many of [the feminist movement's] demands center on ways to deal with the problems which women face as a result of their unavoidable childbearing function. A prime example is the question of abortion.").

Reva B. Siegel

This opinion presents the abortion right as grounded in the equal citizenship principle, a principle that we have come to understand through the social movement struggles that produced the Fourteenth and Nineteenth Amendments. At the time the Court decided *Roe*, the women's movement was arguing that equal citizenship required effective access to abortion. In a line of cases decided just after *Roe*, the Court interpreted the Fourteenth Amendment's Equal Protection Clause to prohibit sex discrimination, but declared that regulation directed at pregnant women was not the kind of sex-based state action that could violate the Equal Protection Clause.[13] This opinion demonstrates how the constitutional jurisprudence of abortion and equal protection might differ had the Court developed sex discrimination doctrine with laws prohibiting abortion as its paradigm, rather than excluded, case.

I have elsewhere argued that the abortion right can be understood on sex-equality grounds.[14] This opinion draws on that earlier work but differs in that it grounds the abortion right in equality arguments under the

Fourteenth and Nineteenth Amendments that were actually advanced by the women's movement in the 1960s and 1970s. The sex equality arguments for abortion rights circulating at the time *Roe* was decided were an integral part of the movement's demands for equal citizenship.[15] Modern sex discrimination doctrine has adopted the movement's understanding of equal citizenship in significant part. For this reason, an understanding of the abortion right that has not been incorporated into equal protection doctrine nonetheless resonates plausibly within it.

The second-wave feminist movement understood sex equality as a question rooted in the roles, practices, and institutions of family life. By 1973, the movement's constitutional lawyers argued that regulation of the pregnant woman was presumptively unconstitutional when it enforced stereotypes and sex role prescriptions of the separate-spheres tradition. A classic expression of this understanding is an equal protection brief that Ruth Ginsburg filed in 1972 in a case involving a woman who faced an involuntary discharge from the Air Force because she was pregnant. See Brief for Petitioner, *Struck v. Sec'y of Def.*, 409 U.S. 1071 (1972) (No. 72-178); Ruth Bader Ginsburg, "Remarks for the Celebration of 75 Years of Women's Enrollment at Columbia Law School," 102 *Colum. L. Rev.* 1441, 1447 (2002). Ginsburg's brief in the *Struck* case has been neglected because the Court disposed of the case by remanding it to the Court of Appeals on mootness grounds and soon thereafter ruled that regulation directed at pregnant women was not the kind of "sex-based" state action that would trigger heightened scrutiny under equal protection principles.

In this early period, women advanced sex equality arguments for the abortion right in the streets and in a number of cases. Briefs tied sex equality claims to different provisions of the Constitution—in particular, the Fifth, Eighth, Thirteenth, Fourteenth, and Nineteenth Amendments. See Brief of Amici Curiae Human Rights for Women, Inc. at 11–12, *United States v. Vuitch*, 402 U.S. 62 (1971) (No. 84) (arguing that the statute denies women, as a class, the equal protection of the law guaranteed by the Fifth Amendment in that it restricts their opportunity to pursue higher education, to earn a living through purposeful employment, and, in general, to decide their own future, as men are so permitted, and also arguing that the abortion statute violates the Thirteenth Amendment, on grounds that "[t]here is nothing more demanding upon the body and person of a woman than pregnancy, and the subsequent feeding and caring of an infant until it has reached maturity some eighteen years later"); Brief of Amici Curiae Joint Washington Office for Social Concern et al. at 10–11,

Vuitch (No. 84) (arguing that the abortion statute discriminates against women in violation of their right to equal protection).

Then-attorney Nancy Stearns expressed the equality claim for abortion rights in Nineteenth Amendment as well as Fourteenth Amendment terms. See First Amended Complaint at 6–7, *Women of Rhode Island v. Israel* (D.R.I. June 22, 1971) (No. 4605) (arguing that "denial of the vote represented maintenance of the dividing line between women as part of the family organization only and women as independent and equal citizens in American life"; contending that "[t]he Nineteenth Amendment recognized that women are legally free to take part in activity outside the home. But the abortion laws imprison women in the home without free individual choice").

In *Roe v. Wade* itself, Stearns submitted an amicus brief challenging the Georgia and Texas abortion statutes in explicit sex equality terms on Fourteenth Amendment, due process, equal protection, and Eighth Amendment grounds. There she argued, with respect to the due process claim, that "restrictive laws governing abortion such as those of Texas and Georgia are a manifestation of the fact that men are unable to see women in any role other than that of mother and wife." See Brief of Amici Curiae New Women Lawyers et al. at 24, 32, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18). She further argued, with respect to the equal protection claim, that "laws such as the abortion laws presently before this court in fact insure that women never will be able to function fully in the society in a manner that will enable them to participate as equals with men in making the laws which control and govern their lives," id. at 32, and she contended, with respect to the Eighth Amendment claim, that

> [s]uch punishment involves not only an indeterminate sentence and a loss of citizenship rights as an independent person . . . [and] great physical hardship and emotional damage "disproportionate" to the "crime" of participating equally in sexual activity with a man . . . but is punishment for her "status" as a woman and a potential child-bearer.

Id. at 42; see also Brief for Plaintiffs, *Abramowicz v. Lefkowitz*, 305 F. Supp. 1030 (S.D.N.Y. 1969) (No. 69 Civ. 4469), *cited in* Diane Schulder & Florynce Kennedy, *Abortion Rap* 218 (1971) (attacking New York abortion laws under a Fourteenth Amendment due process claim and asserting that abortion laws are "both a result and symbol of the unequal treatment of women that exists in this society").

While many in the movement argued for abortion rights in the language of equality, by the time of *Roe* the movement had increasingly come to speak about abortion in the language of liberty, privacy, and choice—not only to litigate the question under *Griswold v. Connecticut*, 381 U.S. 479 (1965), but also to protect the ERA from the abortion controversy. Even so, several years after *Roe*, when the Court attempted to exclude regulation of pregnant women from the nation's employment discrimination laws, the women's movement secured an amendment to the Civil Rights Act of 1964 that provided pregnant workers protection against sex discrimination in employment and benefits. See Post & Siegel, supra, at 2011–13. During the 1980s, as critics of *Roe* challenged the opinion's constitutional basis in liberty and privacy values, *Roe*'s proponents increasingly came to defend the abortion right on sex-equality grounds. And when the Court reaffirmed and revised the *Roe* framework in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), these sex equality arguments appeared throughout the justices' opinions. See Kenneth Karst, "Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender," 38 *Wake Forest L. Rev.* 513, 531–35 (2003); Reva B. Siegel, "Abortion as a Sex Equality Right: Its Basis in Feminist Theory," in *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (Martha Fineman & Isabel Karpin eds., 1995) (surveying equality arguments for the abortion right in law review literature and in *Casey*).

This opinion synthesizes sex equality arguments for the abortion right advanced in the years before *Roe* was decided and in the decades during which it was under siege. It shows how the Court could have started sex discrimination jurisprudence in an opinion striking down laws that criminalize abortion, and suggests how this approach would alter our understanding of the abortion right and equal protection law more generally. In reconstructing social movement arguments advanced in the era before the Court decided *Roe*, the opinion also reflects on the relation of judicial and popular constitutionalism. While courts generally work to efface connections between judicial and popular constitutionalism, this opinion aspires to a kind of counter-factual transparency. The opinion reflects on the role that people play in shaping judicial interpretation of the Constitution—and on the ways that judge-pronounced constitutional law can intervene in and shape constitutional culture.

In deriving and enforcing the abortion right, the opinion demonstrates that courts do not merely defer to popular understanding; they identify conflicts between the nation's evolving understandings of its constitutional

commitments and its long-standing beliefs and practices and call upon the nation to revise its customs in the light of its commitments. The opinion suggests how the abortion right is grounded in this dialogic understanding of judicial review. The opinion is drafted on the assumption that the right it enunciates will have to be taken up, defended, and elaborated in judicial and popular fora and that this process is an integral part of the practice of declaring rights—a collaborative process through which the nation's understanding of its constitution evolves.