Making the Case that Anti-abortion Laws Violate 13th Amendment Prohibition of Involuntary Servitude

by Gail L. Johnson

Justice John Paul Stevens wrote in his Casey dissent, "the [state's] interest in protecting potential life is not grounded in the Constitution."

US District Court Judge Colleen Kollar-Kotelly has pointed out that the Dobbs decision was based entirely on the Fourteenth Amendment. She wrote, "it is entirely possible that the Court might have held in Dobbs that some other provision of the Constitution provided a right to access reproductive services had that issue been raised. However, it was not raised." She went on to suggest that the Thirteenth Amendment might be worth a look.

Ironically, the assertion in Dobbs that a pregnant woman is two separate, legally recognizable beings underpins an argument that the Thirteenth Amendment protects women from anti-abortion statutes. While women may no longer have a constitutional right to an abortion, they retain the right not to be subjected to "involuntary servitude" when forced to care for a fetus which essentially has become a ward of the state.

Tug of War Over the Fetus

The three milestone Fourteenth Amendment abortion cases are Roe v Wade (Roe) in 1973, Planned Parenthood v Casey (Casey) in 1992, and Dobbs v Jackson Women's Health Organization (Dobbs in 2022).

Decisions in the milestone cases lay the groundwork for a Thirteenth Amendment prohibition of anti-abortion laws. It's a common misperception that these cases addressed a conflict between a woman and the fetus she is carrying. In fact, the abortion cases turned on the degree to which the woman or the state controls the fetus. This is not so surprising because cases which reached the Court arose from attempts by anti-abortion states to infringe the woman's right to choose.

In Roe during the first three months of a pregnancy, when over 90 percent of abortions take place, a woman had an unfettered right to choose. And during the last three months, when the fetus became viable, the state's "interest in potential life" became compelling so it could ban abortion. In between, the woman had the right to abort a fetus, but the state might impose healthcare regulations.

Nineteen years later in Casey, the Court reaffirmed the woman's right to abort a fetus before viability, as well as the state's ability to ban abortion after viability. However, the decision re-balanced control over the fetus by expanding the

state's right to exercise its "interest" starting at conception. As a result a state could create an obstacle course to discourage and make difficult the abortion choice.

In Dobbs, the Court ruled a woman had no constitutional right to have an abortion because it "destroys… fetal life." To make perfectly clear that the woman's loss is the state's gain, the opinion suggests, but does not rule, that a state's abortion ban would be considered a health and welfare regulation and thus subject to minimal constitutional scrutiny.

The Court has not expressed an opinion about when human life begins. It has never granted a fetus personhood.

The Roe decision says:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

In his separate opinion in Casey, Justice Antonin Scalia writes that "as a legal matter" whether the fetus is a human life is "a value judgment." Finally, Dobbs hues to this position as well with the statement, "Our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth."

Thirteenth vs. Fourteenth Amendment

At the time of Roe, the Court had already deemed certain aspects of a person's life to be so private that they were protected from intrusive state regulation by the due process clause of the Fourteenth Amendment. The protection included such things as the right to purchase and use contraception, decisions about child rearing and education, as well as the right to marry someone of a different race. In both Roe and Casey the Court ruled that the decision to bear a child was consistent with the other intensely personal, protected aspects of private life and thus entitled to protection. However, this protection had to be balanced against a state's interest in fetal life, hence the tug of war.

The Court changed its mind in Dobbs, deciding that because pregnancy involves two beings, it is unique, and therefore not among the protected aspects of private life. The most lucid explanation of the reasoning is found in Chief Justice William Rehnquist's Casey dissent, which became law in Dobbs:

> Unlike marriage, procreation, and contraception, abortion 'involves the purposeful termination of a potential life.'… The abortion decision must therefore 'be recognized as *sui generis,* different in kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.'… .One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus.

Fourteenth Amendment tug of war is over; states win.

The constitutional question now must be re-framed. Instead of whether a woman has a right to choose, the issue must be whether a state has the right to subject pregnant women to "involuntary servitude." Prohibition against involuntary servitude is explicitly stated in the Thirteenth Amendment:

> 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> 2. Congress shall have power to enforce this article by appropriate legislation.

Pregnancy Redefined

Pregnancy now involves three parties:

a person entitled to constitutional protection,
a fetus in which the state has an "interest", and
the state if it so chooses.

What role does each play?

When a state exercises its "interest in potential life" by enacting anti-abortion legislation, it essentially takes control of the fetus. This is true whether the ban starts at 6 weeks or 15 weeks or 20 weeks. This is true whether the state considers the fetus to be potential life, unborn life or an unborn human being. This is true of all pregnancies, whether the woman does or does not wish to carry the fetus to full term. *This is not about abortion*.

At the point in a pregnancy when an abortion ban goes into effect, to all intents and purposes, the state becomes the guardian of the fetus. The fetus becomes a ward of the state. The woman becomes the caretaker for a ward of the state. She is required to provide her services to the state without compensation and whether she wants to or not. The anti-abortion law leaves her no choice. *She has been forced into "involuntary servitude."*

State anti-abortion statutes violate the Constitution's explicit prohibition against involuntary servitude. Lest this seems too far-fetched, Justice Harry Blackmun's dissent in Casey likens anti-abortion law to conscription:

> State restrictions on abortion compel women to continue pregnancies they otherwise might terminate. By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.

The wide disparity between the power of the state and the power of the woman forces subservience. The state employs its power to fine, imprison or

otherwise punish anyone who enables a woman to step outside the bounds of an abortion ban. She finds herself in a legal cage.

Supreme Court View of the Thirteenth Amendment

The Thirteenth Amendment, ratified in 1865, freed the slaves after the Civil War. The 1873 Slaughterhouse cases provided the first opportunity for the Supreme Court to define the parameters of this amendment:

> While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade when they amount to slavery or involuntary servitude, and the use of the word "servitude" is intended to prohibit all forms of involuntary slavery of whatever class or name.

Thirteenth Amendment litigation rarely comes before the Court. However, in the 1988 Kozminski opinion, Justice Sandra Day O'Conner wrote, "our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion."

Free. Free. Free. Free to Choose

The Thirteenth Amendment has not outlived its purpose or its promise. It can free women from the "legal coercion" which forces a pregnant woman to be the caretaker for a ward of the state. The Thirteenth Amendment can free women to live according to their own personal moral and religious values. The Thirteenth Amendment can free them to manage their own lives and bodies. The Thirteenth Amendment can free them to decide whether to carry a fetus to term.