

No.

IN
Supreme Court of the United States

—
JANE DOE

V.
SOUTH DAKOTA

—
BRIEF ON THE MERITS FOR THE PETITIONER
—

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Questions Presented

- 1) Does the South Dakota Anti-Abortion Statute (SDCL § 22-17-8) Violate the Court's Holding in *Roe v. Wade*, and, thereby, Jane Doe's privacy rights?
- 2) Does the South Dakota Anti-Abortion Statute (SDCL § 22-17-8) Violate Jane Doe's Fourteenth Amendment Rights to Equal Protection of the Law?
- 3) Does the South Dakota Anti-Abortion Statute (SDCL § 22-17-8) Subject Jane Doe to a Condition of Involuntary Servitude in Violation of the Thirteenth Amendment of the Constitution of the United States?

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Statement of the Case

Jane Doe is a female adult resident of the state of South Dakota, subject to the laws of the state of South Dakota. Jane Doe was eight weeks pregnant at the time this lawsuit was filed on October 15, 2006. Jane Doe wished to avail herself of the services of a medical practitioner for the purpose of obtaining an abortion. Before the passage of the South Dakota Abortion Law, the abortion could have been performed at the Planned Parenthood Clinic in her hometown of Pierre. Because of her financial difficulties paying for the procedure, she would have qualified for a Planned Parenthood subsidy, and the procedure would have cost her \$200. Jane would have missed two days of work at the Wal-mart, where she had that much time to take off because of accrued vacation leave. Jane would never have had to reveal her pregnancy to her boss, her family, or her friends. Jane could have made a practical choice to terminate her unwanted pregnancy. Jane could have avoided disclosing her pregnancy, and could have chosen to end it before fetus viability.

Instead, the South Dakota Anti-Abortion Law was enforced against Ms. Doe. No doctor in South Dakota would perform an abortion for fear of being held responsible for a Class Five Felony under SDCL § 22-17-8, which criminalizes performing abortion or prescribing medicine to induce an abortion. Planned Parenthood informed Ms. Doe that, according to SDCL § 22-17-5.1, a doctor would be allowed to perform an abortion to save her life, but only for that reason. The physical vitality of Ms. Doe's life was not at risk. While there was no penalty for her decision to have an abortion, Ms. Doe was unable to obtain one within the state of South Dakota.

Ms. Doe filed suit in the District Court of South Dakota contending both that the enforcement of the South Dakota law was a violation of her privacy rights, a violation of her Fourteenth amendment right to equal protection, and a violation of her Thirteenth amendment right to be free from involuntary servitude. The District Court held that the South Dakota law violated the privacy rights enumerated in *Roe v. Wade* (410 US 113 (1973)), and thereby struck it down. *Doe v. N. Dakota*, 1 F.4d 302 (2007). The District Court did not rule on the Fourteenth amendment question or Ms. Doe's involuntary servitude claim. On appeal, the Court of Appeals for the Eighth Circuit reversed the decision of the District Court that the South Dakota law violated a Ms. Doe's right to privacy, citing the compelling state interest in fetal protection and improvements in scientific knowledge since *Roe*. *N. Dakota v. Doe*, 3 F.4d 102 (2007). The opinion of the Court in the Court of Appeals did not address the Fourteenth amendment question or the Thirteenth amendment question either, but a dissenting opinion did. That dissent emphasized the problems with privacy as a ground for the constitutional right to abortion, and urged the Court of Appeals and the Supreme Court to instead begin relying on the Thirteenth amendment to the Constitution of the United States. *Doe*, 3 F.4d at 106. Ms. Doe requested certiorari for the examination of the issues of her privacy rights, her Fourteenth amendment right to equal protection of the laws, and her Thirteenth amendment right to protection from involuntary servitude, and now argues her case.

Does the South Dakota Anti-Abortion Statute (SDCL § 22-17-8) Violate the Court's Holding in *Roe v. Wade*, and, thereby, Jane Doe's privacy rights?

This Court, in *Roe v. Wade*, decided that the question of abortion in the first trimester must be left to a woman and her doctor for privacy reasons. 410 US at 114. This Court further held that states could not regulate first trimester abortions. 410 US at 115. Nonetheless, in direct defiance of *Roe*, the South Dakota statute regulates and forbids first trimester abortions. Since *Marbury v. Madison*, the Supreme Court has held the right of judicial review, and the position as the final interpreter of federal constitutional rights. If South Dakota can pass a law in open defiance of Supreme Court precedent, the Court risks either fully losing that authority or losing its credibility. The Supreme Court should consider the South Dakota Anti-Abortion law as a direct contradiction of its directions in *Roe*, simultaneously considering whether South Dakota has the authority to pass such a law, whether that law is indeed a violation of *Roe*, and whether *Roe* is still good law.

The Court in *Roe* held that the its recognized right of personal privacy, rooted either in the First Amendment, the Ninth Amendment, or the Fourteenth Amendment, was the ground on which women held a constitutional right to an abortion. 410 US at 152. This Court held that the right to privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” 410 US at 154. While the Court held that this “right is not unqualified, and must be weighed against important state interests in regulation,” those interests discussed in *Roe* were all after the first trimester. 410 US at 155. *Roe* explicitly decided that the word “person” as used in the Fourteenth Amendment does not apply to the unborn. 410 US at 159.

The South Dakota Anti-Abortion Statute bans abortion even in the first trimester and applies the word “person” to the unborn. This Statute sits in direct contradiction of the *Roe* instruction that:

“For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician” 410 US at 163.

Given this contradiction, it is in the Court’s interest to decide both whether the South Dakota Anti-Abortion Statute is a direct violation of *Roe v. Wade*, whether, if it is a direct violation, *Roe v. Wade* is still good law, and whether, if it is a direct violation and *Roe v. Wade* is still good law, there is any consequence to South Dakota’s passing a statute in direct violation of a Supreme Court decision.

Ms. Doe argues that there is no compelling interest that should cause this court to overturn *Roe v. Wade*, which is good precedent. Abortion was generally legal in the United States until the mid-nineteenth century. See James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (1978). Original campaigns to make abortion illegal centered around policing women’s sexual morality, a cause which courts and legislators alike have long since abandoned as a sound approach to lawmaking. When abortion is a crime, many women die from it. See Phillip G. Stubblefield & David A. Grimes, “Septic Abortion,” 331 *New Eng. J. Med.* 310, 310-11 (1994). Worldwide, there is one death per every 100 illegal abortions, and over 100,000 women die per year from illegal abortion. It is estimated that the deaths from illegal abortions are eight times as many as from legal abortions. See Henry Morgentaler, *Abortion and Contraception* 110 (1982). Also, legalizing abortion in the United States did not change the abortion rate. See

Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees at 18; *Webster v. Reproductive Health Servs.*, 492 US 490 (1989)(No. 88-605).

Recognizing a privacy right for women's bodies and women's lives has become established law in American jurisprudence. In *Griswold v. Connecticut*, 381 US 479 (1965), Justice Douglas wrote:

This law ... operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation . . . Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy.

The *Griswold* decision, overturning a law which forbids the use of contraceptives, relies on the logic that the law interferes with people's intimate relationships, and reflects with horror on the possibility of police searching couples' bedrooms for evidence of the use of contraceptives.

After *Griswold*, *Roe v. Wade* affirmed the existence of the right to privacy and applied it to the situation of abortion. In *Roe*, the court struck down Texas's criminal abortion statute. The Court held that the right to choose abortion is a liberty protected in its privacy from unwarranted government intrusion, and that the state had no compelling interest in preserving fetal life before viability. 410 U.S. at 163-65. The Court also held that the fetus is not a "person" within the meaning of the Fourteenth amendment. 410 US at 157.

In *Roe*, the Court affirmed that it had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution", citing *Palko v. Connecticut*, 302 US 319, 325 (1937). This right has been applied in cases relating to parenting and education (*Pierce v. Society of Sisters*, 268 US 510, 535 (1925)),

contraception (*Griswold*), family relationships (*Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)), marriage (*Loving v. Virginia*, 388 US 1, 12 (1967)), and now abortion (*Roe v. Wade*). The court classified this right as located in the Fourteenth amendment jurisprudence of substantive due process. Justice Blackmun explained the harm that criminal abortion laws cause:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional off-spring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bring a child into a family unable, psychologically or otherwise, to care for it [T]he additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in the consultation.

The Court classified these a woman's right to choose abortion as a fundamental right which can only be limited by a compelling state interest, and decided that there is no compelling state interest in preserving the life of a fetus before viability, though there may be after viability.

The state argues that we have more information about fetus viability than we did at the time that *Roe v. Wade* was decided. Because *Roe v. Wade* used the concept of viability but did give it a precise definition, there are those who argue that it is a malleable concept. The Court defined viability as capable of prolonged life outside of the mother's womb. Justice Sandra Day O'Connor warned that the use of the concept of viability was a slippery slope, contending that access to improved technology continues to drive the date of potential viability earlier and thus allow states to overregulate abortion. Fetuses are indeed being declared viable between two and four weeks earlier than they were at the time *Roe*

was decided. The question of the appropriateness of viability as a standard is one that the Court should take up, but not one which affects Ms. Doe's privacy rights in this case. Ms. Doe requested an abortion in the eighth week of her pregnancy, a full fourteen weeks earlier than a baby has ever survived being delivered. According to *Roe*, the state has no compelling interest in fetal life at that time, since the fetus was not viable.

Roe decriminalized abortion and left the decision in the hands of the woman and her doctor, when the fetus was not viable. The decision in *Roe* was affirmed in *Planned Parenthood v. Casey* 595 US 833 (1992). Still, South Dakota made a law criminalizing the administration of abortion in direct defiance of this decided law. South Dakota argues that *Roe v. Wade* should be overturned, but all of the warrants for the legalization of abortion, including women's lives, women's health, women's privacy, and medical regulation, remain as important as they ever were, if not more important. *Roe v. Wade* should be affirmed as good law, especially in the face of South Dakota's open defiance of the mandate of this court.

South Dakota is not the only state which has made a law in direct or indirect defiance of the Court's ruling in *Roe v. Wade*. In fact, Given the vagueness of either the content or the enforcement of *Roe v. Wade*, a number of states hold conflicting laws on the question of abortion. Sixteen states and the District of Columbia have never repealed laws ruled unconstitutional by *Roe v. Wade*. Those states include Alabama, Arizona, Alaska, California, Colorado, Delaware, the District of Columbia, Massachusetts, Michigan, Mississippi, New Hampshire, New Mexico, Oklahoma, Texas, Vermont, West Virginia, and Wisconsin.

Several states have made laws declaring the prohibition of abortion if *Roe v. Wade* is overturned (Illinois, Kentucky, Louisiana, and South Dakota are among them). Five States have laws declaring their intent to ban abortion to the fullest extent permitted by the Constitution. These include Arkansas, Missouri, Nebraska, North Dakota, and Pennsylvania. On the other hand, Connecticut, Maine, Maryland, Washington, and Nevada have codified an affirmative right to abortion based on *Roe v. Wade*.

Eighteen states have mandatory waiting periods for an abortion, even when a fetus is not viable. Idaho, Kansas, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, and Utah currently enforce mandatory waiting periods.

Inherent in these conflicts between state law are several very important legal questions about the meaning and status of the legal right to abortion, including the question of whether privacy rights can be enforced, what privacy a woman is entitled to, and how much discretion the medical personnel dealing with her case have to act on their perception of their patients' best interest.

Were the Court to decisively resolve these questions, much of the attention that is now spent on abortion law would likely be freed up to deal with other parts of the Court's jurisprudential concerns. Also, were the Court to clarify and fortify *Roe v. Wade*, these conflicting and confusing state laws would be clarified as well, which would be a public good.

Roe v. Wade gives Ms. Doe a constitutional right to an abortion before fetus viability, protected by her privacy rights, found in the substantive due process clause of the

Fourteenth amendment. She was denied that right by the South Dakota abortion statute, which violates *Roe v. Wade* and thereby the Fourteenth amendment.

Does the South Dakota Anti-Abortion Statue (SDCL § 22-17-8) Violate Jane Doe's Fourteenth Amendment Rights to Equal Protection of the Law?

There are those, and Ms. Doe is among them, who believe that *Roe v. Wade* was decided on inappropriate grounds, and that abortion is not a privacy issue but a gender equality issue. They point out how many times the Court in *Roe* found it necessary to reference Ms. Roe's marital status in making the decision to allow her to have an abortion. They ask exactly *where* Roe's protected private is. See Catharine McKinnon, *Sex Equality*, 2001: 1222. Is it inside a woman's head? Is it inside her womb? Is the government not already present in those places? Feminists have long wondered if the word *private* carries with it implications of shamefulness as it is used in the *Roe* decision, and have been critical of the public/private divide.

The divide between the personal and the political categorizes the suffering of many marginalized groups and peoples, especially women, as non-political or 'private.' Susan Okin observes that there are some rights and privileges that it is difficult to obtain recognition for because they have been dismissed as a part of the 'private' sphere (1998, 39). The division of the political and social world into 'public' and 'private' marginalizes those interests which are in private places, like inside the home, or inside their bodies. Okin recognizes that the concepts of 'inside' and 'outside' are problematic for women's political rights, and argues this dichotomy is gendered and in need of reformulation. Spike Peterson contends that the 'private' is always public, as "to the extent that personal gender

identities constitute a ‘core’ sense of ‘self,’ they fundamentally condition our self-esteem and psychological security” (1999, 37). Gillian Youngs documents that politics works through a “patriarchal prism” which encourages “a prioritization of public sphere activities over the private realm on the basis of a power relationship between the two” (Youngs 2000, 45). A gender-based critique of the separation between the public and private calls attention to spatial relations of oppression, which is essential to understanding the dynamics of gendered and other subordinations (Youngs 2000, 48). The public/private dichotomy that has marginalized women for centuries is used to keep ‘normal politics’ as seen exclusively in the public realm, and women’s lives as exclusively in the personal realm (Tickner 2001). There is a problem when women have to seek their right to abortion in the private realm, when women are “distinctively unequal” in private, and “defined as second-class citizens by virtue of their being identified with the private” (MacKinnon 2001). As McKinnon describes:

[W]hile the private has been a refuge for some, it has been a hellhole for others, often at the same time. In a gendered light, the law’s privacy is a sphere of sanctified isolation, impunity, and unaccountability ... Everyone is implicitly equal in there. If the woman needs something – say, equality to make these assumptions real, privacy law does nothing for her. “Reflections on Sex Equality Under Law,” 100 *Yale L. J.* 1281, 1311 (1991).

Ms. Doe contends that privacy and equality are fundamentally in tension. In the words of the Women’s Legal Education and Action Fund,

In equality terms, a law against abortion is an attempt by someone outside a woman’s body to control the life of the woman by forcing her, through government intervention, to become a mother Sex equality is not promoted when the state supports the coerced reproductive use of a woman by a man. It is the woman who has the primary concern and interest in the life, health, welfare, and life possibilities of her fetus ... It is sex discrimination, prohibited by the [Canadian and Quebec] Charters, for a

court to do what a legislature is constitutionally prohibited from doing: disadvantage women by law. Factum of the Women's Legal Education and Action Fund (LEAF), *Daigle v. Tremblay*, [1989] 2 S. C. R. 530 (File No. 21533, as quoted in MacKinnon, *Sex Equality*, 2001: 1227).

In this logic, an anti-abortion statute is not a violation of women's privacy rights, but a violation of her right to equal protection of the law; not a personal issue, but a sex equality issue. Many scholars and advocates of women's rights have wondered how abortion law specifically and gender equality law and practice would differ had *Roe v. Wade* been decided on sex equality grounds.

Ms. Doe asks that the Court declare the denial of her right to an abortion as a violation of her right to equal protection of the laws, as bestowed by the Fourteenth amendment. An amicus brief in *Roe* argued that criminal abortion statutes "violate the most basic Constitutional rights of women" due to the fact that "women bear the disproportionate share of the de jure and de facto burdens and penalties of pregnancy, child birth, and child rearing. Thus, any statute which denies a woman the right to determine whether she will bear these burdens denies her equal protection of the laws." Brief Amicus Curiae on Behalf of New Women Lawyers, Women's Health and Abortion Project, Inc., National Abortion Action Coalition at 6, *Roe v. Wade*, 410 US 112 (1973) (No. 70-18). Ms. Doe contends that women bear disproportionate burden when pregnancy results from sex, and that forcing women to continue that burden denies them equal protection of the laws.

Ruth Coker extended this argument, contending that "an equal protection approach can demonstrate that female adolescents are, in fact, the group *most* in need of heightened scrutiny because the sphere of family-related privacy, coupled with legislative insensitivity, has caused them to be a highly disadvantaged and politically powerless group." Ruth

Coker, “An Equal Protection Analysis of U.S. Reproductive Health Policy: Gender, Race, Age, and Class” 1991 *Duke L.J.* 324, 359.

The argument that abortion is a sex equality issue is not a new one. In fact, one of the first constitutional challenges to a state abortion statute contended that it constituted discrimination against women on the basis of sex. *See Abele v. Markle*, 452 F2d 1121 (2d Cir 1971). Abortion is considered a sex equality issue in several other countries, including Germany and South Africa (MacKinnon 2001, 1245). In these countries, the interconnections in women’s inequality between forced sex, economic deprivation, and reproduction are recognized as a matter of law (MacKinnon 2001, 1246). Professor Riga Siegel frames a sex-equality ground for overturning anti-abortion laws:

Abortion-restrictive regulation is state action compelling pregnancy and motherhood, and this simple fact cannot be evaded by invoking nature or a woman’s choices it presents a equal protection concerns that Roe’s psychological reasoning obscures The objective of abortion-restrictive regulation is to force women to assume the role and perform the work that has traditionally defined their secondary social status. Reva Siegel, “Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection,” 44 *Stan. L. Rev.* 261, 350-51 (1992).

Cass Sunstein also argues that “abortion restrictions selectively turn women’s reproductive capacities into something for the use and control of others” while “no parallel disability is imposed on men.” Cass Sunstein, “Neutrality in Constitutional La” 92 *Colum. L. Rev.* 1, 31-32 (1992). Like Professor Sunstein, Ms. Doe argues that existing abortion law, based on an allegedly sex-neutral privacy standard, wrongly relies on the assumption that the sexual order and reproductive status quo are “natural, just, and prepolitical” (Sunstein 1992, 4). This assumption is in itself sex-discriminatory. The “sexual order” is in

itself discriminatory, and privacy-based abortion laws, which assume the naturalness of women's roles as mothers, entrench that discrimination.

Perhaps the reason that the Fourteenth amendment jurisprudence concerning equal protection of the laws has not been extended to abortion cases is its own fundamentally gendered logic. In one of equal protection's earlier articulations, the Court stated that "the Fourteenth Amendment ... undoubtedly intended ... that equal protection and security should be given to all under like circumstances in the enjoyment of personal and civil rights." *Barbier v. Connolly* 113 US 27, 30 (1885). Men and women are not "similarly situated" as relates to abortion laws, and therefore abortion laws have not been seen as a violation of women's rights to equal protection of the law. That abortion laws outlaw abortions *for women* and not *for men* does not discriminate against women similarly situated to men, because men do not need or want abortions.

The sex discrimination problem in laws which criminalize abortion comes not from the similar situation of men and women but from the different situation of men and women, and the need for those differently situated men and women to be afforded equal protection of the laws *accounting for* rather than *ignoring* their difference. As Professors Sunstein and MacKinnon argue, anti-abortion laws create and reify a caste system which places women as second-class citizens. This inequality is certainly under the purview of the spirit of the Fourteenth amendment, and can be read into its text – women, by being made victim of a discriminatory law, are denied equal *protection* of the laws.

Ms. Doe was looking for equal protection of the laws when she decided to have an abortion. She decided that she was unprepared for and unwilling to bear the risks of pregnancy and the costs of child birth and child rearing. Ms. Doe did not believe that

motherhood was right for her, and did not want to devote the next decades of her life to work which she did not choose. She chose not to bear the disproportionate burden of pregnancy on women. She asked to be, like *all men*, free from that responsibility. When she was denied that freedom, she was also denied sex equality, and therefore equal protection of the laws. Ms. Doe asks that you find that her Fourteenth amendment right to equal protection of the laws was violated by the enforcement of the South Dakota anti-abortion statute in her case, and she asks that the Court declare the South Dakota anti-abortion statute unconstitutional as a violation of women in South Dakota's right to equal protection of the laws in the United States.

Does the South Dakota Anti-Abortion Statute (SDCL § 22-17-8) Subject Jane Doe to a Condition of Involuntary Servitude in Violation of the Thirteenth Amendment of the Constitution of the United States?

Ms. Doe also asks the Court to find the South Dakota abortion statute a violation of the Thirteenth amendment, which protects her from involuntary servitude. Ms. Doe's Thirteenth amendment argument encourages the Supreme Court to break from the privacy-based logic which serves as the defense of a woman's right to abortion in *Roe v. Wade*, the foundational and continuing rule which gives American women a constitutional right to abortion. Ms. Doe further asks the Court to add a labor analysis to the equal protection argument that she makes, determining abortion to be the right of women in the United States under both the Thirteenth and Fourteenth amendment. Finally, she requests damages for involuntary servitude from the state of South Dakota.

Ms. Doe contends that forcing a woman to remain pregnant when she is unwilling to do so constitutes involuntary servitude, which is a violation of her rights under the

Thirteenth Amendment to the Constitution of the United States. While the Supreme Court has discussed the Thirteenth amendment in several previous cases, the scope of the amendment's protections has never been decisively determined. Ms. Doe's argument that the amendment applies both to women as a class and to herself individually in the area of abortion provides the court an opportunity to decide that question specifically while also clarifying the scope of the Thirteenth amendment protection to which citizens of the United States are entitled.

In text, the Thirteenth amendment provides, in relevant part:

Section 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.

The Supreme Court has never ruled on the question of the extent of protection from involuntary servitude. Involuntary servitude means a condition of servitude in which the victim is forced to work for defendant by use or threat of physical restraint or by use or threat of coercion through law or legal process. *United States v. Kozminski*, 487 US 931, 931 (1988). In resolving a conflict among the Circuits, the Supreme Court limited involuntary servitude to physical force or legal coercion, excluding psychological coercion. *Kozminski*, 487 US at 939. The phrase "involuntary servitude" was intended to "cover those forms of compulsory labor akin to African slavery". *Butler v. Perry*, 240 US 328. The amendment is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances," and thus provides a constitutional guarantee. *Civil Rights Cases*, 109 US 3 (1883).

Still, the circumstances under which the Thirteenth amendment is applicable and the nature of the constitutional guarantee that it gives has yet to be specified. In *Kozminski*, the

Court explained that “while the general spirit of the phrase ‘involuntary servitude’ is easily comprehended, the exact range of conditions it prohibits is harder to define”. 487 US at 942; *Clyatt v. United States*, 197 US 207 (1905). The Court has characterized the thirteenth amendment as abolishing slavery and establishing universal freedom, but has left open the question of whether section 1 of the amendment did anything more than abolish slavery. *Jones v. Alfred H. Meyers Co*, 392 US at 439. The Court has intentionally left open that question several times. *See Jones*, 392 US at 439; *Memphis v. Greene* 451 US 100.

Ms. Doe contends that her rights and the framers’ intent merit the resolution of this question for this case. Ms. Doe references Senator Trumbull’s ambitions for the Thirteenth Amendment in House debate in 1866: “The Thirteenth amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons within the United States practical freedom” Cong.Globe, 39th Cong., 1st session, 474 (1866). The Supreme Court has also hinted that the Thirteenth Amendment has a broader purpose than simply abolishing the formal institution of slavery. The Court has recognized the Amendment’s purpose as “not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States. 42 USCA § 1994; 18 USCA § 1581; USCA Const. Amend. 13.

Lower courts have decided on the question of the application of the Thirteenth amendment to questions outside of black slavery, but their decisions are in conflict. In *Lyes v. City of Riviera Beach* (166 F.3d 1332, 11th Cir. 1999), the 11th Circuit decided that the Thirteenth amendment did not apply to any circumstances outside of race discrimination. The court held:

It is clear that section 1985(4) was enacted, at least in part, under Congress’ authority to eliminate the ‘badges and incidents’ of slavery pursuant to

section 2 of the Thirteenth Amendment. *See* USCA Const. Amend. 13; *Griffin v. Breckenridge*, 403 US 88, 104-105; *Jones*, 392 US at 437-44. Congress' authority is limited, however, to the prevention of discrimination on the basis of race. Thus, if we are to interpret section 1985(3) as preventing sex discrimination, we must find some other constitutional grounding. 166 F.3d at 1348.

Additionally, the District Court for the District of Utah has held that the Utah Abortion Act is not a violation of the Thirteenth Amendment. *See Jane L. V. Bangerter*, 794 F. Supp. 1528 (1992). That court held that prohibiting elective abortion did not bring a woman into involuntary servitude, and that equating carrying a child to term with "compulsory labor" "strains credulity" and "borders on the frivolous" *Jane L.*, 794 F. Supp. at 1549. On the other hand, the United States District Court for the District of New York, held that the Thirteenth amendment did apply to women's rights. *Nicholson v. Williams* 203 F. Supp.2d 153, 220 (2002). The Court held, in relevant part:

The Thirteenth Amendment bears on the interpretation of the law insofar as it attempts to protect the right of mothers and children not to be forcefully separated without being 'convicted' – here adjudicated properly as neglectful and neglected. It provides in part: Neither slavery nor involuntary servitude, except as punishment for a crime ... shall exist within the United States. The word race does not appear in the Thirteenth Amendment. Even if it did, it would not preclude the inclusion of this amendment in an overall application of the Constitution to the issue at hand. *US v. Nelson*, 277 F.3d 164 (2nd Cir 2002).

Discrimination against women was deeply imbedded in our law until relatively recently. The law cannot ignore the profound sexual connotations of the Thirteenth Amendment. *See* Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* ("The Thirteenth Amendment ... should protect exploited workers, abused mothers, neglected children, and all other victims of relationships reminiscent of slavery")(citing sources)." *Nicholson v. Williams* 203 F. Supp.2d 153, 220 (2002).

In short, not only is the question of the applicability of the Thirteenth amendment to abortion rights unsettled, it is the subject of conflicting opinions below. Ms. Doe's

contention that the South Dakota Anti-Abortion Law compels women to carry and bear women, creating compulsory motherhood, which is a condition of involuntary servitude. She contends that the fetus' right to life does not automatically guarantee it a right to continued aid from the mother. Quite the opposite, giving fetuses a right to use their mothers' bodies is precisely what the Thirteenth amendment forbids. This argument was first raised by an amicus brief in *Roe* by the California Committee to Legalize Abortion (No. 70-8), but has not yet been decided. The time is ripe for the decision of this issue.

Ms. Doe contends that the State of South Dakota subjected her to involuntary servitude by effectively forcing her to remain pregnant against her will. She contends this servitude included adding weight to her body, increasing the difficulty of her job, burdens on her health, the financial burden of medical care, the work of labor itself, the work of finding an adoption agency, the work required to earn the money to hire a suitable lawyer for the adoption, and the work involved in repairing her diminished mental, physical, and emotional state.

First, Ms. Doe points out that there are many situations in daily life where women's situation is tantamount to servitude. Nancy Hirschmann's extensive work on relational autonomy serves as a useful starting point for exploring this argument (1989). Hirschmann explains that the liberal understanding of obligation understands it as a limit on human behavior that a person has consented to, either implicitly or explicitly, by agreement or social contract (1989, 1227-28).

In practical politics, there are a number of obligations assigned to people who did not consent to them, actively or passively. The assumption of consent manifests the gender bias in an individualistic understanding of autonomy and obligation (Hirschmann 1989,

1228-9). This bias is not just in the practical impact of the theory, but in its very structure. Hirschmann defines structural gender bias as “the bias of the very structure of obligation (its being defined solely in voluntarist terms, and the fact that *nonvoluntary obligation* is an oxymoron) toward a masculinist perspective which automatically excludes women from obligation on an epistemological level” (Hirschmann 1989, 1229). The current epistemology of political obligation is such that it is gender biased.

As she addresses gender bias in obligation, Hirschmann argues that freedom is central to most understandings of responsibility (1989, 1233). Liberal concepts like individual freedom and natural rights are not always gender-neutral in theory or effect, even though they appear so on face. Hirschmann demonstrates this point psychoanalytically. In development, the girl is more likely to learn sameness from a mother and the boy is more likely to learn difference, so the boy develops conflictual tendencies while the girl develops peaceful ones (Hirschmann 1989, 1235). Boys’ freedom is reactive autonomy; girls’ is relational autonomy (Hirschmann 1989, 1235). This difference is manifested in the gendered lives people live. Hirschmann explains it as an issue of power:

If the conception of freedom as negative is premised on the struggle for recognition, particularly on the ability to be recognized without reciprocation; if non-recognition is (as it is for the Oedipal boy and Hegel’s master) a form of power and violence; freedom, too, must be at least in part an expression of that same power and violence. (Hirschmann 1989, 1238)

In an obligatory relationship, the obliged must recognize and defer to the obligor but the obligor owes the obliged no such respect. (Hirschmann 1989, 1239). In social relationships, women are often the obliged and men the obligor, with no reciprocal relationship. This cycle is self-perpetuating: the obligated have no power to obligate others, and thus remain in the subordinate position of obliged. Femininities are obligated to recognize masculinities

but masculinities are under no similar obligation to heed femininities. Hirschmann explains, “consent thus seems to save us from authoritarian coercion. But in reality it merely masks it” (Hirschmann 1989, 1239). Consent is often partial and sometimes non-existent but always appears complete. Femininities come to an unfair bargaining table with an unfair bargaining position. They lose at the negotiations without agreeing to, but it appears that everyone is equal at the end. Hirschmann explains it as a trap where “even acts of dissent are interpreted as acts of consent, and unfair bargaining positions belie the freedom implicit in free choice” (Hirschmann 1989, 1239). Theories of obligation that assume voluntary consent are then complicit in gender subordination. (Hirschmann 1989, 1240).

The incompleteness of women’s consent in a gendered world is obvious when we look at most divisions of labor. According to Catharine MacKinnon, “income provides one telling measure of relative group status. According to the US Bureau of the Census, comparing income of full-time year-round workers in the United States by sex, women on average have made two-thirds of the male wage since 1967” (2001, 147). Women also work part-time more than men. Further, “focus on paid labor alone tells an incomplete story of women’s work” (MacKinnon 2001, 149). The work that women do at home, in their families, without pay, is invisible to every budget in the United States, from the household to the national account. *See* Marilyn Waring, *If Women Counted* (1988). If all of women’s household labor, everywhere in the world, were paid, every national budget would quadruple, and there would not be a country in the world which could be saved from bankruptcy. *See* MacKinnon 2001 (150).

Every society in the world, including our own, assumes the naturalness of women's performing the labor of childbearing and childrearing *without compensation*, though no one would deny the intensity of the labor. This assumption comes from the parallel assumptions that women are both *naturally interested in* motherhood and second-class citizens. These assumptions are manifested in the abortion laws of South Dakota and other states. Andrew Koppelman describes laws which limit a woman's access to abortion as *not only* individual denials of equal protection *but also* individual and group subjections to involuntary servitude:

That injury has both individual and social aspects: forced pregnancy is a deprivation of individual liberty (and this is what the privacy argument stresses), but that deprivation is selectively imposed on women--and women are a group that has traditionally been regarded as a servant caste, whose powers (unlike those of men) are properly directed to the benefit of others rather than themselves. Compulsory motherhood deprives women of both liberty and equality. Andrew Koppelman, "A Thirteenth Amendment Defense of Abortion," 84 *Nw. U. L. Rev.* 480, 481 (1990).

The strength of this argument over its companion privacy and equal protection-related defenses of abortion is that it provides, for the first time, a gender-equal balancing test of the rights of a woman and the fetus, rebutting South Dakota's argument that fetal personhood is enough to deprive a woman of her constitutional right to an abortion. According to Koppelman,

This argument makes available two responses to the objection that the fetus is a person. The first is that, even if this is so, the fetus' right to continued aid from the woman does not automatically follow. As Thomson observes, "having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body--even if one needs it for life itself." Quite the reverse, giving fetuses a legal right to the continued use of their mothers' bodies would be precisely what the thirteenth amendment forbids. The second response is that since abortion prohibitions infringe on the fundamental right to be free of involuntary servitude, the state bears the burden of having to show that the violation of this right is justified. The

State cannot carry this burden, because no one knows how to prove (or disprove) that a fetus is, or should be considered, a person. The mere possibility that it might be is not enough to justify violating women's Thirteenth Amendment rights by forcing them to be mothers. 84 *Nw. U. L. Rev.* at 485.

In addition to making a clear rule for abortion, a Thirteenth amendment standard makes substantive sense. Much scholarship and jurisprudence on the issue contends that the Thirteenth amendment was meant to go further than covering the situation of slavery as defined in the antebellum Southern United States. Were the Thirteenth amendment intended to be applied narrowly to slavery, it would have only included the term “slavery” among its prohibitions. The language of the Thirteenth amendment, however, includes prohibitions against *both* slavery and involuntary servitude, implying strongly that the term “involuntary servitude” adds a prohibition not covered by the term “slavery,” an inference very much supported by the words of Senator Trumbull quoted above.

Koppelman correctly argues (1990: 508) that the thirteenth amendment has been adjudicated as about ownership of self, and as a blanket prohibition against the master/slave relationship, even when risked or voluntarily acceded to by the person in the position of slavery. This prohibition is meant to protect the individual from coercion and the group of which the individual is a member from invidious symbolism. This interpretation of the Thirteenth Amendment rebuts the potential counterargument that women assume the risk of pregnancy when they choose to have sex. First, this would still be a disparate impact in equal protection terms. Second, involuntary servitude is not something one can assume the risk of – the Constitutional prohibition is a blanket one, which includes assumed risk and even original voluntary assent of the servitude. Third, a woman who uses a method of birth control which is ninety-five percent effective has a

seventy percent chance of pregnancy over the course of a decade. *See* Ross, Contraception: Short-Term and Long-Term Failure Rates. 21 *Fam Plan Persp* 158 (1988). Thus, it is a risk even cautious women are unlikely to avoid. Likewise, in contract law, workers are able to get out of contracts *at will* provided they pay the damages – no one can be forced to do a job they originally agreed to, no matter how strong the original agreement, if they stop wanting to. The application of involuntary servitude jurisprudence to the question of abortion draws a parallel: whether a woman assumes the risk of pregnancy or originally agrees to the labor, she cannot be forced to continue such labor against her will, because *in any other circumstance* such forced labor would be considered involuntary servitude and prohibited by the 13th amendment.

The state of North Dakota puts forth two arguments to rebut Ms. Doe’s Thirteenth Amendment contention. First, they contend that pregnancy is not really “labor” in the sense meant by the framers of the Thirteenth Amendment. Ms. Doe points out that it is no coincidence that none of the framers of the Thirteenth Amendment had ever been pregnant, and, that, nonetheless, framers like Senator Trumbull did envision the Amendment protecting women from involuntary servitude. Further, Plaintiff’s experts have prepared a list of work tasks which go into a pregnancy which, italicizing those which the pregnant woman will experience even when intentionally neglecting generally understood medical practices during and after pregnancy:

- Avoid exposure to cleaning solvents and paint
- Visit the doctor regularly
- Breastfeed
- Avoid or quit smoking
- Drink 6-8 glasses per water a day
- Eat 6-11 servings of grain, 3-5 servings of vegetables, and 2-4 servings of fruits
- Take 400 micrograms of folic acid/day
- Genetic testing

Take 30 milligrams of iron each day
Experience cramps, uterine contractions, vaginal bleeding, leaking of amniotic fluid, dizziness, fainting, shortness of breath, palpitations, tachycardia, constant nausea and vomiting, trouble walking, and edema
 Do not drink alcohol or do drugs
 Limit caffeine intake
Morning sickness
 Avoid saunas, hot tubs, steam rooms, and other situations of excessive heat
 Avoid or get rid of pet rodents
 Avoid handling cat litter
 Avoid eating rare meat
 Avoid gardening
 Get needed vaccines
 Be within 15 pounds of your ideal weight plus pregnancy weight
 Avoid Xrays
 Monitor your diet with a nutritionist
 Sleep at least seven hours each night
Be prepared to be one of the 1/4 of pregnant women who have serious complications; the 1/8 of pregnant women who have premature babies, or the 1/16 of pregnant women who have children with serious birth defects
Be prepared to be one of the 11% of women with Post Partum Depression
Hold twice the risk of battery as a non-pregnant woman
Be prepared to be one of the 1/3700 women who die in childbirth
Deal with the intense pain of labor
Experience hypovolemic shock, heavy bleeding, hypopituitarism, non-progression of labor, fetal distress, puerperal fever, and lacerations
Spend 12 hours in labor
Pass a 5-9 pound baby out of a hole the size of a quarter
 Spend an average of \$250000 and two decades parenting
 (List compiled by Plaintiff's experts)

Each of these enumerated tasks, as well as many other tasks associated with parenthood, clearly fall within any definition of labor. It is ironic that men call the process of childbirth "going into labor" but are reluctant to classify the child-bearing and child-rearing process as labor for the purpose of involuntary servitude jurisprudence.

The second argument the state of South Dakota makes is that, even were forced pregnancy to fall within the purview of the Thirteenth Amendment, an exception should be made for it. Exceptions have been made to the Thirteenth amendment in Constitutional jurisprudence. These exceptions include one for the draft (*Selected Draft Law Cases* 245

US 366 (1918)) and pretrial detention of crucial witnesses (*Hurtado v. US* 410 US 578, 589 n.11 (1973)). There are important distinctions, however, between these issues and the issue of abortion. First, the exceptions to the Thirteenth Amendment currently a part of constitutional jurisprudence are issues where *the collective* has an interest in individual behavior. There has never been an exception to the Thirteenth Amendment where the needs of one individual have been enough to justify a condition of involuntary servitude on another, and there has been no argument that there is a collective interest in the birth of an individual woman's child. Second, neither of these exceptions in themselves violate the Fourteenth Amendment by creating a disparate impact on a disadvantaged group, where a potential exception for the forbidding of abortion would do so. Finally, the state of South Dakota has provided no logic as to why there should be an exception to the Thirteenth Amendment to allow women's involuntary servitude while others' remains prohibited.

Ms. Doe contends that her Thirteenth Amendment rights were violated by the State of South Dakota's decision to force her to carry, care for, and deliver a fetus. Since the involuntary servitude provisions of the Thirteenth Amendment are self-enforcing, the denial of Ms. Doe's rights is actionable even in absence of legislative or judicial precedent banning such a violation. Ms. Doe accordingly seeks damages in the amount of \$1 million from the state of South Dakota, which covers medical expenses, compensatory damages, and emotional distress.

Request for Decision

Ms. Doe requests that the Court find South Dakota's abortion law, inasmuch as it was enforced against her before the viability of her fetus, a violation of the substantive due process provisions of the Fourteenth Amendment and accordingly a violation of Ms. Doe's

privacy rights and the rights of those similarly situated. Ms. Doe further requests the Court find that South Dakota's abortion law, inasmuch as it was enforced against her before the viability of her fetus, an instance of disparate impact and a violation of her Fourteenth Amendment right to equal protection of the law and the rights of those similarly situated. Finally, Ms. Doe requests the Court find that South Dakota's abortion law, whenever enforced, is a violation of Ms. Doe's Thirteenth Amendment right to freedom from involuntary servitude and the rights of those similarly situated.