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Abortion Restrictions During a Pandemic at the Intersection of the 13th Amendment and Electoral Legislation

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Dr. Cynthia Boyer

Abortion Restrictions During a Pandemic at the Intersection of the 13th Amendment and Electoral Legislation

19 U.N.H. L. REV. 423 (2021)

ABSTRACT. The current pandemic is intensifying restrictions on a wide range of fundamental rights which form a key pillar of the rule of law, it includes access to reproductive rights. Some states have moved forward with their ideological quest of control and infringement of constitutional rights in order to ban or limit abortion what is a fundamental attack on constitutional rights and in particular those associated with the Thirteenth Amendment. These restrictions on abortion resulting from the proclamation of a state of emergency follow the path already taken by certain states to reinforce their coercive measures. They raise major legal and political questions with regard to reproductive rights and individual freedom. As the state continues to impose and exercise strong and unequal constraints on women's bodies through anti-abortion laws and pandemic restrictions through an instrumentalization of the health crisis, it establishes a system of involuntary servitude and subordination for procreation which breaches the 13th Amendment.

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I. ABORTION AT THE INTERSECTION OF LAW AND POLITICS	426
A. <i>Abortion Restrictions as a Political Tool</i>	426
B. <i>State Restrictions and Abortion in Pandemic Time</i>	429
II. ABORTION RESTRICTIONS FROM THE THIRTEENTH AMENDMENT TO THE SUPREME COURT.....	438
A. <i>Servitude and Subordination for Procreation</i>	438
B. <i>Restrictions for Medication Abortion During the Pandemic and the Supreme Court</i>	443

In these troubled times, there is a great temptation to turn away from fundamental rights. The path taken by some U.S. states over the past year under the cover of the current pandemic has veered towards a fundamental attack on constitutional rights and in particular those associated with the Thirteenth Amendment. Every state has declared a state of emergency due to the coronavirus pandemic,¹ which remains in accordance with international and national law if it is temporary. But some states have seized the opportunity to move forward with their ideological quest of control and infringement of constitutional rights in order to ban abortion. While abortion rates in the United States are at historically low levels,² the year 2019 marked an important crossroads in the assessment of their legality. Indeed, since last year, fourteen states have enacted laws to limit access to abortion, while three states have signed a law to protect the right to abortion. Alabama passed the most restrictive law in the country, prohibiting abortion after six weeks of pregnancy, with no exceptions made for pregnancy resulting from rape or incest. Following the proclamation of a state of emergency, Oklahoma, Alabama, and Iowa joined Texas and Ohio in banning most surgical abortions in their states, asserting that medical abortions are not defined as medical emergencies and, thus, are not allowed during coronavirus-related restrictions on medical procedures.

In 1944, President Franklin D. Roosevelt proposed a “Second Bill of Rights” for Americans, asserting that “freedom from want,” which included “the right to adequate medical care and the opportunity to achieve and enjoy good health,” was an essential liberty for human security.³ It has become constitutive commitment,⁴ meaning that everyone has the right to access preventive health care and to benefit from medical treatment. Thus, restrictions resulting from the proclamation of a state of emergency can be justified only if they are strictly necessary, proportionate, and adequate to achieve this objective and if they are applied without any

¹ Rosie Perper, Ellen Cranley & Sarah Al-Arshani, *Almost all US States have declared states of emergency to fight coronavirus*, BUSINESS INSIDER (Mar. 17, 2020, 1:34 AM), <https://www.businessinsider.com/california-washington-state-of-emergency-coronavirus-what-it-means-2020-3?IR=T> [<https://perma.cc/8WV9-N48D>]; *COVID-19 restrictions: Map of COVID-19 case trends, restrictions and mobility*, USA TODAY (Dec. 16, 2020) <https://eu.usatoday.com/storytelling/coronavirus-reopening-america-map/>.

² November 23, 2018, CDC Morbidity and Mortality Weekly Report: Abortion Surveillance—United States 2015, 67(No. SS-13): 1–45, [<https://perma.cc/NZ7X-96FR>].

³ Franklin D. Roosevelt, State of the Union Address (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 32–42 (Samuel I. Rosenman ed., 1950).

⁴ Randy E. Barnett & Cass R. Sunstein, *Constitutive Commitments and Roosevelt's Second Bill of Rights: A Dialogue*, 53 DRAKE L. REV. 205 (2005).

discrimination. The purpose of this article is to demonstrate that this is not the case in this pandemic, which is being used to reinforce the coercive measures taken by certain states concerning abortion in violation of fundamental human rights.

These restrictions on abortion raise major legal and political questions with regard to reproductive rights and individual freedom. However, beyond the individual states' latitude, the question of the constitutionality of these restrictions arises at the national level. Part I will examine the interference of politics in the law relating to the private sphere and individual freedom in correlation with the notion of counter-majority power with the goals of achieving an electoral majority and ideological dominance in the time of pandemic. Part II will focus first on the various restrictions of constitutional and fundamental human rights, in particular, the Thirteenth Amendment, in an approach inherent to the position of servitude that these different laws and restrictions generate, asserting that it establishes a system of involuntary servitude and subordination for procreation.

I. ABORTION AT THE INTERSECTION OF LAW AND POLITICS

Abortion is a politically polarizing topic in the United States that divides sharply based on political affiliations: 59% of Republicans believe abortion should be totally illegal, while 75% of Democrats believe the opposite.⁵ Faced with this polarization, political candidates and legislatures are particularly focused on electoral conquest and accountability, especially with regard to elections. Several American states have thus decided to limit the right to abortion in the name of the fight against COVID-19.⁶ The associations that campaign for the right to abortion see it as an ideological maneuver on the part of the conservative fringe.⁷

A. *Abortion Restrictions as a Political Tool.*

Fully 40% of voters see abortion as "very important" to their vote, according to a

⁵ Press Release, Ipsos, Abortion Poll (June 3, 2019), [<https://perma.cc/CYD6-P22B>].

⁶ Jessica Glenza, *States use coronavirus to ban abortions, leaving women desperate: 'You can't pause a pregnancy'*, THE GUARDIAN (Apr. 30, 2020, 7:00 AM), <https://www.theguardian.com/world/2020/apr/30/us-states-ban-abortions-coronavirus-leave-women-desperate> [<https://perma.cc/L2TN-QQKF>].

⁷ Patrice A. Harris, Am. Med. Ass'n. President, AMA statement on government interference in reproductive health care (Mar. 30, 2020), <https://www.ama-assn.org/press-center/ama-statements/ama-statement-government-interference-reproductive-health-care> [<https://perma.cc/5B9X-KZPS>].

poll from Pew.⁸ According to a Gallup report,⁹ “[n]early half of U.S. adults (47%) polled in May say the issue will be just one of many important factors in their vote for a candidate for a major office; 25% do not consider it a major issue.” At the same time, 24% of U.S. adults say they will vote only for a candidate who shares their views on the issue, which is significantly higher than most other years in the trend.¹⁰ Abortion has been a hallmark of political campaigns since the 1970s and restrictive abortion laws are nothing new. For decades, states have been passing laws designed to limit access to abortion services in an effort to make the right to abortion virtually meaningless.¹¹ It is no surprise that presidential candidates are turning to this perennially polarizing issue.

The United States, in a coalition of thirty-two countries representing more than 1.6 billion people, issued a declaration at the United Nations that there is “no international right to abortion.”¹² On October 22, 2020, Secretary of State Michael R. Pompeo and Health and Human Services (HHS) Secretary Alex Azar participated in the virtual signing of the Geneva Consensus Declaration. The document was co-sponsored by the United States, Brazil, Egypt, Hungary, Indonesia, and Uganda, and co-signed by thirty-two countries in total, representing more than 1.6 billion people.¹³ “Point 3” of the declaration states that the ministers and high representatives of governments “[r]eaffirm the inherent ‘dignity and worth of the human person,’ that ‘every human being has the inherent right to life,’ and the commitment ‘to enable women to go safely through pregnancy and childbirth and

⁸ *Election 2020: Voters Are Highly Engaged, but Nearly Half Expect To Have Difficulties Voting*, PEW RSCH. CTR. (Aug. 13, 2020), <https://www.pewresearch.org/politics/2020/08/13/election-2020-voters-are-highly-engaged-but-nearly-half-expect-to-have-difficulties-voting/> [<https://perma.cc/J7G3-YMLJ>].

⁹ Megan Brenan, *One in Four Americans Consider Abortion a Key Voting Issue*, GALLUP (Jul. 7, 2020), <https://news.gallup.com/poll/313316/one-four-americans-consider-abortion-key-voting-issue.aspx> [<https://perma.cc/5LK3-WUEX>].

¹⁰ *Id.*

¹¹ T.J. Raphael & Amber Hall, *In the 45 years since Roe v. Wade, states have passed 1,193 abortion restrictions*, THE WORLD (Jan. 22, 2018, 4:30 PM) <https://www.pri.org/stories/2018-01-22/45-years-roe-v-wade-states-have-passed-1193-abortion-restrictions> [<https://perma.cc/PX3N-DGNJ>].

¹² Press Release, U.S. Dep’t of Health and Hum. Servs., Secretary Azar Statement on March for Life (Jan. 23, 2020), <https://www.hhs.gov/about/news/2020/01/23/hhs-secretary-azar-statement-on-march-for-life.html> [<https://perma.cc/J9V5-F75W>].

¹³ Press Release, U.S. Dep’t of Health and Hum. Servs., Trump Administration Marks the Signing of the Geneva Consensus Declaration (Oct. 22, 2020), <https://www.hhs.gov/about/news/2020/10/22/trump-administration-marks-signing-geneva-consensus-declaration.html> [<https://perma.cc/W6QQ-453Q>].

provide couples with the best chance of having a healthy infant.”¹⁴ “Point 4” of the declaration states that the signatories “[e]mphasize that ‘in no case should abortion be promoted as a method of family planning’ and that ‘any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process.’”¹⁵

In line with the Trump Administration, some states have used the coronavirus pandemic to restrict women’s rights. They used the exceptional measures taken to fight the pandemic—which allow medical procedures deemed non-essential or urgent to be suspended—to limit access to voluntary termination of pregnancy under coronavirus-related emergency measures. They have tried to ban abortions as part of emergency orders against elective medical procedures and nonessential businesses by expanding on existing laws that already strictly limited the procedures before the pandemic. The coronavirus-linked restrictions have all followed the trend of recent years in which states in the South and Upper Midwest have restricted or attempted to ban abortion, while some other states on the West and East Coasts have strengthened access to abortion. Since Donald Trump’s accession to the White House, these states have amplified their efforts in the hope that the Supreme Court, refitted by the Republican president who is also currently opposed to “choice,” will reverse its jurisprudence. Indeed, abortion regulations have been moving along this year, with highly restrictive state bans making national headlines as the result of a national offensive against abortion for several years, with a two-step strategy. The first step, in southern states such as Louisiana, is to increase the restrictions surrounding the application of abortion, limiting in particular access to clinics performing these procedures. Then the goal is to urge the Supreme Court to reconsider the issue, hoping that the new Conservative majority will overturn *Roe v. Wade*,¹⁶ which in 1973 legalized abortion. A long list of conservative state legislatures have passed or are considering draconian bans and restrictions on abortion. Already in 2019, states including Georgia, Ohio, Kentucky, and Mississippi have banned abortion at six weeks and Florida, Maryland, Minnesota, South Carolina, and West Virginia introduced six-week bans but have

¹⁴ Geneva Consensus Declaration On Promoting Women’s Health and Strengthening the Family, <https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english.pdf> [https://perma.cc/JZ6B-VRNU].

¹⁵ Press Release, U.S. Dep’t of Health and Hum. Servs., Trump Administration Marks the Signing of the Geneva Consensus Declaration (Oct. 22, 2020), <https://www.hhs.gov/about/news/2020/10/22/trump-administration-marks-signing-geneva-consensus-declaration.html> [https://perma.cc/W6QQ-453Q].

¹⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

not yet moved on them. Alabama meanwhile, has banned abortion nearly completely, even in cases of rape or incest, and South Carolina is currently weighing a ban that would not even provide exceptions for grave birth defects.

On March 13, 2020, President Donald J. Trump declared a National Emergency in light of COVID-19's presence in the United States.¹⁷ The American jurisprudence has never mentioned a "suspension clause" in the event of a health emergency.¹⁸ But at the state level, some states have attempted to temporarily ban abortions or limit abortion access during the coronavirus outbreak via COVID-related orders. Those states included Alaska, Alabama, Arkansas, Indiana, Iowa, Louisiana, Mississippi, Ohio, Oklahoma, Tennessee, Texas, and West Virginia.

B. State Restrictions and Abortion in Pandemic Time

1. Alabama

Republican Governor Ivey proclaimed a state of emergency in Alabama in response to the COVID-19 virus.¹⁹ On March 19, 2020, State Health Officer Dr. Scott Harris issued an emergency health order stating, "Effective immediately, all elective dental and medical procedures shall be delayed."²⁰ It did not define the term elective medical procedures. On March 20, 2020, the State Health Officer issued an amended order that did not alter the language concerning elective medical and surgical procedures.²¹

On March 27, the State Public Health Officer issued a second amended order postponing medical procedures except in cases of a medical emergency or "to avoid serious harm from an underlying condition or disease, or necessary as part of a

¹⁷ Proclamation No. 9994, 85 FED. REG. 15, 337 (Mar. 13, 2020).

¹⁸ William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 AM. J. COMP. L. SUPP. 389 (1990), see also Amy Barrett & Neal K. Katyal, *The Suspension Clause*, THE NATIONAL CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/763> [https://perma.cc/NBP9-KBEQ].

¹⁹ Office of Ala. Governor Kay Ivey, State of Alabama Proclamation by the Governor (Mar. 13, 2020), <https://governor.alabama.gov/newsroom/2020/03/state-of-emergency-coronavirus-covid-19/> [https://perma.cc/Q4PC-E8LC].

²⁰ Office of Ala. Governor Kay Ivey, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (Mar. 19, 2020), [https://perma.cc/NGJ7-AVLJ].

²¹ Office of Ala. Governor Kay Ivey, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (as amended Mar. 20, 2020), [https://perma.cc/GB9Z-82AW].

patient's ongoing and active treatment."²² This order covers all elective medical procedures, including abortions. A provision of the March 27 health order was carried over in an April 3 order stating:

The Alabama Department of Public Health (ADPH) reminds medical providers including dentists, physicians, and other medical providers of the current statewide stay-at-home order's applicability to dental, medical and surgical procedures.

In this regard, through close of business on April 30, all such procedures are to be postponed, subject to two exceptions:

- a. Dental, medical, or surgical procedures necessary to treat an emergency medical condition. For purposes of this order, emergency medical condition" is defined as a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances, and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected by a person's licensed medical provider to result in placing the health of the person in serious jeopardy or causing serious impairment to bodily functions or serious dysfunction of bodily organs.
- b. Dental, medical, or surgical procedures necessary to avoid serious harm from an underlying condition or disease, or necessary as part of a patient's ongoing and active treatment.²³

As a consequence, the Attorney General Marshall signaled at least some abortions would be criminal acts, per the emergency order, because they did not fall within the exceptions.

The March 27 Order was also promulgated as an emergency rule, which is not set to expire for 120 days.²⁴ A federal district court in Alabama issued a preliminary injunction allowing providers to determine on a case by case basis if an abortion is necessary to avoid additional risk, expense, or legal barriers²⁵ and the Eleventh Circuit upheld the preliminary injunction.²⁶

2. Alaska

In Alaska, Republican Governor Mike Dunleavy's administration in the Health

²² Office of Ala. Governor Kay Ivey, Order of the State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (amended Mar. 27, 2020), [<https://perma.cc/J57C-J7SS>].

²³ Ala. Dep't of Pub. Health, Stay at Home Order Applicability Regarding Dental, Medical and Surgical Procedures (Apr. 17, 2020), [<https://perma.cc/2EXK-RFQJ>].

²⁴ ALABAMA DEPARTMENT OF PUBLIC HEALTH RULE, 420-4-1-13 (2020). <https://www.alabamapublichealth.gov/legal/assets/order-socialdistancing-signed-032720.pdf> [<https://perma.cc/4QRR-RVAY>].

²⁵ *Robinson v. Marshall*, 454 F. Supp. 3d 1188 (2020).

²⁶ *Robinson v. Attorney General*, 957 F.3d 1171 (2020).

Mandate 005, issued on March 19, 2020, required patients, providers, hospitals, and surgical centers to postpone or cancel non-urgent or elective procedures in order to help prevent the spread of COVID-19 and thereby decrease the overall impact on the Alaska health care structure, and also to preserve personal protective equipment.²⁷ Revised on April 7, 2020,²⁸ the amended mandate clarified the non-urgent medical procedures to be postponed or canceled due to the coronavirus outbreak, providing an extensive list that includes numerous cancer surgeries as well as abortions.

3. Arkansas

In Arkansas, Republican Governor Hutchinson, on April 4, 2020, issued Executive 20-13,²⁹ and on April 3, 2020, the Arkansas Department of Health (“ADH”) Directive on Elective Surgeries barred all surgical abortion, “except where immediately necessary to protect the life or health of the patient” (the “COVID-19 Abortion Ban”). The directive stated:

Exceptions to this directive should be made in the following circumstances:

- If there is a threat to the patient’s life if the procedure is not performed.
- If there is a threat of permanent dysfunction of an extremity or organ system if the surgery is not done.
- If there is a risk of metastasis or progression of staging of a disease or condition if surgery is not performed.
- If there is a risk that the patient’s condition will rapidly deteriorate if surgery is not done, and there is a threat to life or an extremity or organ system or a threat of permanent dysfunction or disability.³⁰

On April 14, the Arkansas governor issued Executive Order 20-18 amending EO 20-03 that declared an emergency in Arkansas.³¹

²⁷ Office of Alaska Governor Michael J. Dunleavy, COVID-19 Health Mandate (Mar. 19, 2020), <https://content.govdelivery.com/accounts/AKDHSS/bulletins/2822c2e> [<https://perma.cc/FCT9-KTVA>].

²⁸ Office of Alaska Governor Michael J. Dunleavy, Amended COVID-19 Health Mandate 005 (as amended Apr. 7, 2020), [<https://perma.cc/RRT4-N5XV>]; Office of Alaska Governor Michael J. Dunleavy, Attachment C to Amended COVID-19 Health Mandate 005 (as amended Apr. 7, 2020), [<https://perma.cc/KD2L-7RX3>].

²⁹ Ark. Exec. Order No. 20-03 (Apr. 4, 2020), [<https://perma.cc/TB5D-WBHL>].

³⁰ ADH Directive on Elective Surgeries. April 3, 2020 https://content.govdelivery.com/attachments/ARAG/2020/04/10/file_attachments/1424442/Elective_Procedure_Directive_April_3.pdf [<https://perma.cc/2TK5-3VTF>].

³¹ Ark. Exec. Order No. 20-18 (Apr. 13, 2020), [<https://perma.cc/69NB-8ZBE>].

4. Indiana

In Indiana, an executive order signed by Republican Governor Eric Holcomb called for abortion clinics to cancel or postpone elective and non-invasive procedures. It is being praised by anti-abortion groups and legislators and viewed with some caution by pro-choice advocates. The executive order, signed March 30, relates to managing Indiana's health care response during the COVID-19 pandemic.³² During a March 31 press conference about the state's COVID-19 response, Holcomb said he included abortion clinics in the executive order because of the "coming surge" of COVID-19 cases in Indiana. "I directed all health care facilities -- hospitals, surgical centers, veterinarians, dental offices, dermatologists -- and yes, abortion clinics, to postpone or cancel all elective or non-urgent procedures," Holcomb said.³³ "Unless, of course, by doing so would cause harm to the patient, in which case, I would leave up to the doctor to determine and decide. Any and all medical expertise and personal protective equipment first needs to go toward . . . defeating COVID-19."³⁴

5. Iowa

In Iowa, Republican Governor Kim Reynolds expanded the state's public health emergency proclamation amid the deepening coronavirus pandemic, halting "non-essential" surgical and dental procedures. The order, which took effect December 16, states:

[A]ll nonessential or elective surgeries and procedures that utilize PPE must not be conducted by any hospital, outpatient surgery provider, or outpatient procedure provider, whether public, private, or nonprofit. . . . A nonessential surgery or procedure is one that can be delayed without undue risk to the current or future health of a patient, considering all appropriate factors including, but not limited to any: (1) threat to the patient's life if the surgery or procedure is not performed; (2) threat of permanent dysfunction of an extremity or organ system; (3) risk of metastasis or progression of staging; and (4) risk of rapidly worsening to severe symptoms.³⁵

Iowa Governor Kim Reynolds listed abortion among nonessential medical

³² Ind. Exec. Order No. 20-13 (Mar. 30, 2020), [<https://perma.cc/MEK8-FVVG>].

³³ Alexandra Kukulka, *Indiana governor calls on abortion clinics to cancel or postpone 'elective' procedures in COVID-19 pandemic response*, CHICAGO TRIBUNE (Apr. 3, 2020, 2:17 PM), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-planned-paretnhood-order-st-0404-20200403-4limx74nevc2ncb34m7coyloym-story.html> [<https://perma.cc/H4D4-ZGAE>].

³⁴ *Id.*

³⁵ Office of Iowa Governor Kimberly K. Reynolds, Proclamation of Disaster Emergency (Dec. 16, 2020), [<https://perma.cc/GVR6-U5BN>].

procedures temporarily banned across the state in response to the pandemic.³⁶ The proclamation extends to surgical abortion procedures.³⁷

6. Louisiana

On March 18, 2020, the Louisiana Department of Health’s Office of Public Health issued a notice³⁸ directing and requiring that all licensed healthcare facilities and all healthcare professionals licensed by the Louisiana State Board of Medical Examiners or the Louisiana State Board of Nursing immediately adhere to the following: “[A]ny and all medical and surgical procedures that, in the opinion and judgment of the physician or other appropriate healthcare professional acting within the scope of his/her license, can be safely postponed for a period of thirty (30) days, SHALL be postponed for a period of thirty (30) days.” This thirty-day period ran from March 19, 2020, through April 21, 2020.³⁹

On March 21, 2020, another notice⁴⁰ was issued by the Louisiana Department of Health’s Office of Public Health directing and requiring that all licensed healthcare facilities and all healthcare professionals licensed by the Louisiana State Board of Medical Examiners or the Louisiana State Board of Nursing immediately adhere to the following: “any and all medical and surgical procedures SHALL be postponed until further notice” subject to exceptions for medical and surgical procedures to: (1) treat an emergency medical condition as defined in 42 C.F.R. § 489.24; or (2) to avoid further harms from underlying condition or disease.

The Louisiana Department of Health’s March 21 directive also directed all healthcare providers to postpone all in-person healthcare services that can be safely postponed for thirty days, and further directed all healthcare providers to transition from in-person healthcare services to a telehealth mode of delivery.⁴¹ Republican Attorney General Landry sent his representatives to the clinics in Louisiana to

³⁶ Jake Webster, *Kim Reynolds' office says her proclamation suspending non-essential procedures includes surgical abortions*, IOWA STATE DAILY (Mar. 29, March 2020), https://www.iowastatedaily.com/news/2020-governor-kim-reynolds-abortion-surgeries-procedures-nonessential-elective-iowa-covid-19-pandemic-coronavirus/article_a5d8b602-7094-11ea-8532-f7e9eb9a0321.html [https://perma.cc/Y6JE-G5AD].

³⁷ *Id.*

³⁸ La. Dep’t of Health, Healthcare Facility Notice #2020-COVID19-ALL-006 (Mar. 18, 2020), [https://perma.cc/C6BT-9KZY].

³⁹ *Id.*

⁴⁰ La. Dep’t of Health, Healthcare Facility Notice #2020-COVID19-ALL-007 (Mar. 21, 2020), [https://perma.cc/H4L9-VJRT].

⁴¹ *Id.*

observe compliance with the directive.⁴² On April 13, the clinics filed suit in federal court to prevent the suspension of abortions.⁴³ On May 1, the clinics settled with the State to permit abortion.⁴⁴

7. Mississippi

In Mississippi, Republican Governor Tate Reeves issued Executive Order No. 1470, which proclaims that:

“all licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient’s physician.”⁴⁵

Neither Reeves’ Order No. 1471 nor Order No. 1470 mentions abortion. Yet, during a live-streamed press conference shortly after Reeves issued the order, one reporter asked if the order would close the abortion clinic; Reeves suggested it would without directly answering the question.⁴⁶ “It shuts down all elective surgeries,” he replied simply.⁴⁷ But the order could have had the effect of ending most abortions in the state for two weeks, except those necessary to “preserve the life of a patient.”⁴⁸

8. Ohio

On March 9, 2020, the Republican Governor of Ohio, Mike DeWine, declared a

⁴² Sam Karlin, *Louisiana officials investigating abortion clinics during coronavirus stay-at-home order*, THE TIMES-PICAYUNE (Apr. 9, 2020, 1:49 PM), https://www.nola.com/news/coronavirus/article_db45b2d8-7a92-11ea-9a6c-17ab001f5b4b.html [https://perma.cc/FWG5-4U47].

⁴³ Mark Ballard, *Louisiana abortion clinics sue to block coronavirus closure; advocate calls it 'abuse of power'*, THE ADVOCATE (Apr. 14, 2020, 1:48 PM), https://www.theadvocate.com/baton_rouge/news/coronavirus/article_80b4612e-7e80-11ea-a33c-bb099e9072de.html [https://perma.cc/R4Z8-BZ8Q].

⁴⁴ Laurie Sobel, et al., *State Action to Limit Abortion Access During the COVID-19 Pandemic*, KAISER FAMILY FOUNDATION (Aug. 10, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-action-to-limit-abortion-access-during-the-covid-19-pandemic/> [https://perma.cc/BF7L-43G9].

⁴⁵ Miss. Exec. Order No. 1470 (Apr. 10, 2020), [https://perma.cc/547E-XFWL].

⁴⁶ Ashton Pittman, *Mississippi's 'Copy And Paste' Abortion Ban: Governor Shared Plan With Radio Host In Advance*, MISSISSIPPI FREE PRESS (Apr. 12, 2020), <https://www.mississippifreepress.org/1996/mississippi-copy-and-paste-abortion-ban-gov-tate-reeves/> [https://perma.cc/9STY-8YDM].

⁴⁷ *Id.*

⁴⁸ *Id.*

State of Emergency via executive order in light of COVID-19.⁴⁹ Amidst a shortage of personal protective equipment, the Ohio Department of Health issued an order⁵⁰ pursuant to the Department's powers under R.C. 3701.13 "cancelling all non-essential or elective surgeries and procedures utilizing personal protective equipment ('PPE') as of 5:00 p.m. on March 18, 2020." The order outlined criteria for determining essential procedures, including "[t]hreat to the patient's life," "threat of permanent dysfunction of an extremity or organ system" and "risk of rapidly worsening to severe symptoms" if a surgery is not performed.⁵¹ Yet Attorney General Dave Yost, a Republican, on March 21 sent letters to three abortion clinics: Planned Parenthood of Southwest Ohio in Cincinnati, Women's Med Center of Dayton, and Preterm in Cleveland. The letters cited the order and told them to "immediately stop performing non-essential and elective surgical abortions."⁵²

9. Oklahoma

In Oklahoma, on March 24, 2020, Governor Stitt through his Executive Order 2020-07 (4th amended) postponed all elective surgeries and minor medical procedures until April 7.⁵³

In a Press Release on March 27, 2020,⁵⁴ clarification was made that "any type of abortion services as defined in 63 O.S. § 1-730(A)(1) which are not a medical emergency as defined in 63 O.S. § 1-738.1 or otherwise necessary to prevent serious health risks to the unborn child's mother are included in that Executive Order."

10. Tennessee

In Tennessee, on March 23, Republican Governor Lee issued an executive

⁴⁹ Ohio Exec. Order No. 2020-01D (Mar. 9, 2020), <https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2020-01-d> [<https://perma.cc/QT55-Q2XQ>].

⁵⁰ Ohio Dep't of Health, Director's Order for the Management of Non-essential Surgeries and Procedures Throughout Ohio (Mar. 17, 2020), [<https://perma.cc/7T54-8PSC>].

⁵¹ *Id.*

⁵² Hannah Knowles, *Ohio clinics ordered to halt abortions deemed 'nonessential' amid coronavirus response*, THE WASHINGTON POST (Mar. 21, 2020, 10:05 PM), <https://www.washingtonpost.com/health/2020/03/21/ohio-abortion-clinics-coronavirus/> [<https://perma.cc/5A47-EKHK>].

⁵³ Okla. Exec. Order No. 2020-07 (Mar. 24, 2020), [<https://perma.cc/ZF6Y-DNEQ>].

⁵⁴ Press Release, Office of Okla. Governor Kevin Stitt, Governor Stitt Clarifies Elective Surgeries and Procedures Suspended Under Executive Order (Mar. 27, 2020), https://www.governor.ok.gov/articles/press_releases/governor-stitt-clarifies-elective-surgeries [<https://perma.cc/QT3J-ZU2R>].

order⁵⁵ which limited non-emergency health care procedures, stating that all hospitals and surgical outpatient facilities in the State of Tennessee shall not perform non-essential procedures. Lee's April 8 executive order—in effect until 12:01 a.m. on April 30—cites the ongoing COVID-19 pandemic and says that “healthcare professionals and healthcare facilities in the State of Tennessee shall postpone surgical and invasive procedures that are elective and non-urgent.”⁵⁶ It defines those procedures as ones “that can be delayed until the expiration of this Order.”⁵⁷ Neither the April 8 order nor the March 23 order addressing non-emergency medical procedures specifically mentions abortion. But Lee spokesman Gillum Ferguson said in a statement that “[t]he intent of this Executive Order is to gain greater access to (personal protective equipment) . . . Gov. Lee believes elective abortions aren't essential procedures and given the state of PPE in Tennessee and across the country his hope and expectation would be that those procedures not take place during this crisis.”⁵⁸

11. Texas

It appears that the coronavirus is a boon for those opposed to the right to abortion in Texas. Texas Republican Governor Greg Abbott issued an order⁵⁹ that required:

. . . all licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.

Texas Attorney General Ken Paxton the next day in a press release indicated that “all licensed health care professionals and all licensed health care facilities, including abortion providers pursuant to Executive Order GA 09 issued by Gov. Greg Abbott, must postpone all surgeries and procedures that are not immediately medically

⁵⁵ Tenn. Exec. Order No. 18, An Order to Reduce the Spread of COVID-19 by Limiting Non-Emergency Healthcare Procedures (Mar. 23, 2020), [<https://perma.cc/34S6-YX82>].

⁵⁶ Tenn. Exec. Order No. 25 (Apr. 8, 2020), [<https://perma.cc/2W7D-HLL7>].

⁵⁷ *Id.*

⁵⁸ *Lawsuit Filed in Tennessee to Keep Abortion Accessible During COVID-19*, NEWS LAW (Apr. 16, 2020), [<https://news.law/lawsuit-filed-in-tennessee-to-keep-abortion-accessible-during-covid-19/>] [<https://perma.cc/V6HM-5W5H>].

⁵⁹ Tex. Exec. Order GA-09 (Mar. 22, 2020), [<https://perma.cc/BE22-AVKJ>].

necessary.”⁶⁰ Failure to comply would result in penalties of up to \$1,000 or 180 days of jail time.⁶¹ A U.S. federal judge on Monday, March 30, suspended the decision of the Texas authorities to include abortions in the list of non-urgent operations prohibited during the crisis of the new coronavirus.⁶² Similar court rulings were handed down in two states that had taken the same measure, Ohio and Alabama.⁶³

12. West Virginia

In West Virginia, Governor Justice on March 31, 2020, issued an executive order prohibiting elective medical procedures.⁶⁴ Executive Order No. 16-20⁶⁵ mandates that all medical procedures that are “not immediately medically necessary to preserve the patient’s life or long-term health” be rescheduled. Under this executive order, “[t]he term ‘elective’ includes medical procedures that are not immediately medically necessary to preserve the patient’s life or long term health, except that procedures that cannot be postponed without compromising the patient’s long term health, procedures that cannot be performed consistent with other law at a later date, or procedures that are religiously mandated shall not be considered ‘elective.’”⁶⁶ Morrissey said the state’s order applies to abortion facilities. “This declaration is broad-based and applies to all facilities,” Morrissey said. “We’ve had some questions: Yes, it also applies to abortion facilities as well.”⁶⁷

⁶⁰ Press Release, Tex. Att’y Gen., Health Care Professionals and Facilities, Including Abortion Providers, Must Immediately Stop All Medically Unnecessary Surgeries and Procedures to Preserve Resources to Fight COVID-19 Pandemic (Mar. 23, 2020), <https://www.texasattorneygeneral.gov/news/releases/health-care-professionals-and-facilities-including-abortion-providers-must-immediately-stop-all#.XnkWzCKrfO8.twitter> [<https://perma.cc/8NFW-UExK>].

⁶¹ *Id.*

⁶² Sami Sparber, *Federal judge temporarily blocks Texas’ ban on abortions during coronavirus pandemic*, THE TEXAS TRIBUNE (Mar. 30, 2020), <https://www.texastribune.org/2020/03/30/texas-attempt-ban-abortions-during-coronavirus-blocked-judge/> [<https://perma.cc/2BKJ-T77X>].

⁶³ Andrew Chung, *U.S. judges stop Texas, Ohio, Alabama from curbing abortions during coronavirus crisis*, REUTERS (Mar. 30, 2020, 4:58 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-abortion/u-s-judges-stop-texas-ohio-alabama-from-curbing-abortions-during-coronavirus-crisis-idUSKBN21H3B1> [<https://perma.cc/QWK8-J539>].

⁶⁴ W. Va. Exec. Order No. 16-20 (Mar. 31, 2020), [<https://perma.cc/83AX-3MYA>].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ News Live Conference April 1st 2020, Gov. Justice holds press briefing on COVID-19 response - April 1, 2020 <https://www.youtube.com/watch?v=cjLoTwiSdc8&t=3552s> (59’).

In Alabama,⁶⁸ Ohio,⁶⁹ and Tennessee, the orders granted by federal district courts have allowed clinics to provide abortion services. But restrictions on access to abortion and contraception can cause irreversible harm, particularly to low-income women and to racial minorities and immigrant communities.⁷⁰ In addition, these restrictions on reproductive health undermine the response to the coronavirus. The pandemic has created challenges for clinics and increased barriers to abortion access. COVID has also limited access in other ways, directly affecting patients, such as by limiting access to transportation and child care, since both public transportation and child care have become harder to access due to the current situation and its corollary restrictions.

II. ABORTION RESTRICTIONS FROM THE THIRTEENTH AMENDMENT TO THE SUPREME COURT

Physical integrity is a guarantee particularly present in the medical world and through the prism of patient rights. This is a negative right, since no one can harm a person's physical integrity without their consent. Consent has relational and contractual basis in medical law governing one's body.⁷¹ Yet, when the act of consenting is denied, servitude starts. This issue arises with the contemporary situation connected to abortion bans, since the question of the free disposal of the body is a corollary of the notion of servitude that the Thirteenth Amendment made unconstitutional. The issue of fundamental human rights, a major public health issue, particularly in this period of pandemic, is also a political issue that is deployed in legal bodies up to the Supreme Court.

A. *Servitude and Subordination for Procreation*

A focus will be made on the various restrictions with regard to the Constitution and fundamental human rights, in particular on the Thirteenth Amendment, highlighting the inherent position of servitude that these different laws and restrictions generate: an involuntary servitude and subordination for procreation. The optimistic and wider appreciation of the Thirteenth Amendment,⁷²

⁶⁸ Robinson v. Marshall, 454 F. Supp 3d 1188 (M.D. Ala. 2020).

⁶⁹ Preterm-Cleveland v. Att'y Gen. of Ohio, 456 F. Supp. 3d 917 (S.D. Ohio 2020).

⁷⁰ See Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in REPRODUCTIVE LAWS FOR THE 1990S (Sherrill Cohen & Nadine Taub eds., 1989).

⁷¹ AM. MED. ASS'N, AMA PRINCIPLES OF MEDICAL ETHICS I, II, IV, VIII (2001).

⁷² See Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012).

conceptualized by Professor Tsesis' collective work⁷³ and following Andrew Koppelman's approach,⁷⁴ offers possibilities to reconsider reproductive rights from another angle. The posture or postulate is puzzling and challenging with regards to American jurisprudence, as it has never been widely used. Thus, it is an open field but relevant in terms of human rights and the possibilities it generates for reconsidering the issue. The argument does not revolve around the debate on the notion of fetal viability but on the earlier and broader notion of the state exercising servitude on people. So far, only one court has ever discussed the Thirteenth Amendment in correlation with abortion restrictions.⁷⁵ Even though this notion has not yet been used in a ruling, it does not mean that it is irrelevant. As Andrew Koppelman Consider replacing with: the earlier and broader prohibition of involuntary servitude in the Thirteenth Amendment writes of his own argument, "[I]f you want to be taken seriously, you had better not make a Thirteenth Amendment argument on behalf of abortion."⁷⁶ Indeed, abortion has been often debated by the interpretation of the Fourteenth Amendment and the right of privacy, but an interpretation of the Thirteenth Amendment also provides a solid legal basis for the protection of human rights. The Thirteenth Amendment reads as follows:

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.

Section 2. Congress shall have power to enforce this article by appropriate legislation.⁷⁷

The postulate here that the Amendment is violated by laws which prohibit abortion by forcing women to serve the state and thus breaching their fundamental right of liberty. In the continuation of Andrew Koppelman's approach, the point is that the state for different reasons, such as political calculation, population increase or stability (which has consequences on federal representation), places women in a position of servitude for procreation. As Justice Field's dissent, a position that would later become largely accepted, argued in the Slaughter-House Cases of 1873, the Fourteenth Amendment could not be construed as only protecting former slaves

⁷³ See generally PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT (Alexander Tsesis ed., 2010).

⁷⁴ See generally Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion* (Nw. U. Sch. L., Working Paper No. 32, 2010).

⁷⁵ *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992).

⁷⁶ Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion* 1 – 2 (Nw. U. Sch. L., Working Paper No. 32, 2010).

⁷⁷ U.S. CONST. amend. XIII.

but rather as incorporating strands of common-law doctrine which required interpretation outside the Civil War context.⁷⁸ The Thirteenth Amendment may also be subject to a wider interpretation.

The extension of the notion of servitude of the Thirteenth Amendment has been used by scholars, but Koppelman grounds it. Indeed, Laurence H. Tribe points out, “The thirteenth amendment’s relevance [to laws requiring a woman to continue an unwanted pregnancy] is underscored by the historical parallel between the subjugation of women and the institution of slavery.”⁷⁹ Donald H. Regan considered that constitutional arguments against abortion statutes could be based on nonsubordination and physical integrity values of the Thirteenth Amendment.⁸⁰ Loretta Ross, Laura Sjoberg, Norman Vieira also asserted that severe abortion constraints amount to “involuntary servitude.”⁸¹ Dov Fox’s essay also provides a relevant perspective by framing further the scope of the doctrine.⁸²

To place the Thirteenth Amendment and its relevance towards women in context, it is important to note that Thomas Jefferson observed that “a woman who brings a child every two years is more profitable than the best man of the farm. What she produces is an addition to the capital, while his labors disappear in mere consumption.”⁸³ The Thirteenth Amendment does not draw a distinction between the physical, manual labor of a woman and the childbearing obligations of female slaves. With the abolition of slavery came women’s right to refuse to have a child, as they were no longer in involuntary servitude.

The Thirteenth Amendment has become increasingly common since the Supreme Court began narrowly construing Congress’ authority to enact legislation

⁷⁸ Slaughter-House Cases, 83 U.S. 36 (1872).

⁷⁹ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1354 n.113 (2d ed. 1988); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335, 337 (1985).

⁸⁰ Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1619–20 (1979).

⁸¹ See Loretta Ross, *Why Not Use the 13th and 14th Amendments to Achieve Reproductive Freedom?*, in REFLECTIONS AFTER CASEY: WOMEN LOOK AT THE STATUS OF REPRODUCTIVE RIGHTS IN AMERICA (Dorothy M. Zellner & Nancy Scerbo eds., 1993); Laura Sjoberg, *Where are the Grounds for the Legality of Abortion? A 13th Amendment Argument*, 17 CARDOZO J.L. & GENDER 527, 542–46 (2011); Norman Vieira, *Hardwick and the Right to Privacy*, 55 U. CHI. L. REV. 1181, 1189–91 (1988).

⁸² Dov Fox, *Thirteenth Amendment Reflections on Abortion, Surrogacy, and Race Selection*, 104 CORNELL L. REV. ONLINE 114 (2019).

⁸³ Letter from Thomas Jefferson to John Wayles Eppes (June 30, 1820), THE JEFFERSON MONTICELLO <https://tjrs.monticello.org/letter/380> [<https://perma.cc/78CR-YD8Z>].

under the Commerce Clause and the Fourteenth Amendment.⁸⁴ “Congress did not confine its action to the prohibition of chattel slavery, but employed the term ‘involuntary servitude’ to abolish all prospective forms of slavery as well.”⁸⁵ The word servitude has a broader meaning than slavery.⁸⁶ The United States Supreme Court defined involuntary servitude as including “those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results”⁸⁷ and “[t]he things denounced are slavery and involuntary servitude . . . All understand by these terms a condition of enforced compulsory service of one to another.”⁸⁸

Early cases interpreting the Thirteenth Amendment indicate that Congress did not intend it to alter traditional relationships other than that of master and slave.⁸⁹ It is precisely on this notion that servitude for procreation is based, with the state acting as a master towards women by placing them in the possible situation of slaves if they have an unwanted pregnancy that they wish to cease. Abortion ban laws and restrictions leading to the suspension of abortions connected to the pandemic clearly violate fundamental basic human rights. The Thirteenth Amendment has raised the entire nation and all its people, without exclusion, up to the ideals first announced in the Declaration of Independence. State and local abortion bans now sweeping the country force pregnant people to endure the hard and dangerous work of pregnancy, labor, and childbirth against their will. Abortion bans place pregnant people seeking abortion under state control and require them to perform involuntary labor.

Abortion bans violate the Thirteenth Amendment by only consigning a woman to reproductive work. This servitude is involuntary when there is no possibility for a woman to refuse it. The lack of choice imposed by the State on women establishes a system of caste, placing at the bottom women who are forced to servitude and denying them what Justice Ruth Bader Ginsburg called “equal citizenship stature” as compared with men.⁹⁰

⁸⁴ Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment*, 45 B.C. L. REV. 307, 349 (2004).

⁸⁵ Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

⁸⁶ Slaughter-House Cases, 83 U.S. 36, 68 (1872).

⁸⁷ *Butler v. Perry*, 240 U.S. 328, 332 (1916).

⁸⁸ *Hodges v. United States*, 203 U.S. 1, 16 (1906).

⁸⁹ Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207 (1992).

⁹⁰ *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

In *Plessy v. Ferguson*,⁹¹ the Court held that involuntary servitude encompasses “the control of the labor or services of one [person] for the benefit of another, and the absence of a legal right to the disposal of [one’s] own person, property, and services.” In *United States v. Kozminski*,⁹² Justice Sandra Day O’Connor summarized Thirteenth Amendment doctrine, stating that “[t]he primary purpose of the Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose.”⁹³ The Supreme Court held:

[T]he term “involuntary servitude” necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury or by the use or threat of coercion through law or the legal process. This definition encompasses cases in which the defendant holds the victim in servitude by placing him or her in fear of such physical restraint or injury or legal coercion.⁹⁴

The state cannot demand of a woman that she maintains an unwanted pregnancy, because that demand places her in a state of involuntary servitude. Forced pregnancy by the state controls the body of the pregnant person and deprives the person of her complete full autonomy to work as a procreation tool for the state since the woman is forced, and psychological and physical consequences are inevitable, which will impact her ability to work. The government, by restricting abortion, is imposing coercion that results in involuntary pregnancy and labor.

In *Planned Parenthood of Southeastern Pa. v. Casey*,⁹⁵ the Court reaffirmed the “essential holding” of *Roe v. Wade*, “the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State.” Denial of bodily autonomy is the essence of violence against human beings. Reproductive coercion by the government— is a form of violence against women. Women have a right to control what happens to their bodies at all times. Forcing a person to continue a pregnancy is first an assault and then servitude. Abortion bans and restrictions violate the fundamental human right to bodily autonomy and liberty guaranteed by the Thirteenth and Fourteenth Amendments of the U.S. Constitution.

In effect, by doing so, the state exerts a forced labor constraint on women. Pregnancy is part of forced labor because the woman is deprived of her body,

⁹¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁹² *United States v. Kozminski*, 487 U.S. 931 (1988).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

representing her work force, for the benefit of the state and its service in the work of procreation and without financial rewards. A slave is compelled to render services for another; prohibiting abortion compels the pregnant woman to render service to the state. Thirteenth Amendment embodies principles of self-body ownership: a property right. The property right includes the body and the mind, and of course extends to procreation, which is also considered as work, like surrogate mothers or male donors of their gametes who are paid for their service as a result of their own will to perform it. “Surrogate motherhood” has shown that women’s reproductive powers are as capable as any other of being transacted for in the marketplace. Gamete donation in the U.S., as are all other assisted reproductive technologies, is an outright, and undoubtedly thriving, commercial activity.⁹⁶ It generates billions of dollars per year⁹⁷ and recruitment of donors is often made in public spaces.⁹⁸ Donors, especially egg donors, are well compensated for their gametes.⁹⁹ They are paid because their donation corresponds to work in its general meaning and they exercise their body’s property right and autonomy.

B. Restrictions for Medication Abortion During the Pandemic and the Supreme Court

Eight months into the COVID-19 pandemic, the Supreme Court finally managed to punt on an abortion case in *Food and Drug Administration v. American College of Obstetricians and Gynecologists (ACOG)*.¹⁰⁰ About 60% of abortions performed in the first ten weeks of pregnancy use two drugs, mifepristone and misoprostol, a few days apart rather than surgery, a method which is under current challenge due to the pandemic and the restrictions resulting from it.¹⁰¹ “The normal requirement of the Food and Drug Administration (FDA) . . . is that the abortion pill

⁹⁶ Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, 4 LAWS 352 (2015).

⁹⁷ Michael J. Malinowski, *A Law-Policy Proposal to Know Where Babies Come from During the Reproduction Revolution*, 9 J. GENDER RACE & JUST. 549, 549–68 (2006).

⁹⁸ Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy between the United States and India*, 39 CUMB. L. REV. 15 (2008).

⁹⁹ Nahata, Leena, et al., *Gamete donation: Current practices, public opinion, and unanswered questions*. *Fertility and Sterility*, NAT’L LIB. OF MEDICINE (2017).

¹⁰⁰ *FDA v. American College of Obstetricians & Gynecologists*, 141 S.Ct. 10 (2020) (mem.).

¹⁰¹ Adam Liptak, *Supreme Court Won’t Immediately Revive Abortion-Pill Restriction*, THE NEW YORK TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/politics/supreme-court-abortion-pill-restriction.html> [<https://perma.cc/2BQF-NK6G>].

be dispensed and administered in-person.”¹⁰² It is part of the Risk Evaluation and Mitigation Strategies (REMS) protocol, reserved for higher-risk drugs and procedures, which was established in 2007.¹⁰³ It is a drug safety program the FDA can require for some medications “that are known or suspected to cause serious adverse effects that cannot be mitigated simply by the label instructions.”¹⁰⁴ In 2011, mifepristone was classified under this program.¹⁰⁵ The American College of Obstetricians and Gynecologists and groups pressed for the restrictions to be lifted during the pandemic in order for women to be able to get the abortion pill without traveling.¹⁰⁶

Indeed, the FDA during the COVID-19 pandemic has lifted some restrictions on many drugs, yet, of the over 20,000 FDA-approved drugs, mifepristone is the only one that the FDA requires to be picked up in person for patients to take at home.¹⁰⁷ Therefore, patients need to go in person to get the drug even after a telephone or e-consultation with a clinician. In May 2020, the American College of Obstetricians and Gynecologists¹⁰⁸ filed a lawsuit in the U.S. District Court in the District of Maryland against the FDA arguing that the in-person dispensing requirement represented an unnecessary burden to abortion access during the pandemic by exposing patients and clinicians to heightened COVID-19 risks, jeopardizing their health and lives for no medical purpose.

The United States District Court of Maryland ruled in favor of the American College of Obstetricians and Gynecologists (ACOG), preventing the FDA from enforcing the REMS for mifepristone during the COVID-19 pandemic on the grounds that the requirements place an undue burden on abortion access under *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁰⁹ Judge Theodore D.

¹⁰² *FDA appeals to Supreme Court over abortion pill regulations*, CATH. NEWS AGENCY (Dec. 16, 2020, 10:05 AM), <https://www.catholicnewsagency.com/news/fda-appeals-to-supreme-court-over-abortion-pill-regulations-52265> [<https://perma.cc/KL28-3MK9>].

¹⁰³ 21 U.S.C.A. § 355-1 (Westlaw through Pub. L. No. 116-269).

¹⁰⁴ *Sixteen Years of Overregulation: Time to Unburden Mifeprex*, 376:8 NEW ENG. J. MED. 790 (2017).

¹⁰⁵ *Mifepristone*, PUBCHEM, <https://pubchem.ncbi.nlm.nih.gov/compound/Mifepristone#section=Information-Sources> [<https://perma.cc/MPH8-Q6UF>] (last visited Feb. 24, 2021).

¹⁰⁶ *American College of Obstetricians & Gynecologists v. FDA*, 472 F. Supp. 3d 183 (D. Md. 2020).

¹⁰⁷ *FDA v. American College of Obstetricians & Gynecologists*, 141 S.Ct. 10 (2020) (mem.).

¹⁰⁸ With the Council of University Chairs of Obstetrics and Gynecology, New York State Academy of Family Physicians, SisterSong Women of Color Reproductive Justice Collective, and an individual family medicine doctor. *American College of Obstetricians & Gynecologists v. FDA*, 472 F. Supp. 3d 183 (D. Md. 2020).

¹⁰⁹ *American College of Obstetricians & Gynecologists v. FDA*, 472 F. Supp. 3d (D. Md. 2020).

Chuang of the Federal District of Maryland lifted the FDA's requirement during the coronavirus pandemic, ruling that women could be prescribed the pill remotely and have it delivered or mailed to them.¹¹⁰

The District Court ruled on July 13, 2020.¹¹¹ The Trump Administration asked the Supreme Court in August to reinstate the rule. The application of the stay was submitted to the Chief Justice on August 26, 2020.¹¹² On September 10, 2020, the reply of applicants Food and Drug Administration, et al. was filed.¹¹³ At that time, Justice Ruth Bader Ginsburg, who passed away on September 18, 2020, was still on the Court. Her death prompted a contentious political battle in the recent hyper-partisan age about whether the U.S. Senate should consider a replacement before the presidential election in November 2020. After a contentious nomination process, Amy Coney Barrett was sworn to become the next associate justice on the Supreme Court of the United States, making her the fifth woman to serve on the Supreme Court. Her tenure began on October 27, 2020. Justice Barrett could have a substantial impact on the court's approach to *Roe v. Wade*,¹¹⁴ cementing the conservative majority. This represents a huge ideological tilt since nothing of this kind on the Supreme Court has happened for fifty years.¹¹⁵

Indeed, in June 2020, Chief Justice John Roberts in *June Medical Services, LLC v. Russo*, 140 S.Ct. 2103,¹¹⁶ provided the crucial vote in a 5 – 4 decision that invalidated Louisiana's Act 620, which opponents said would have left the state with just one abortion clinic.¹¹⁷ The addition of Barrett could swing that vote tally in the other direction. The court reversed the decision of the Court of Appeals for the Fifth Circuit, holding that Act 620 was unconstitutional.¹¹⁸

¹¹⁰ *Id.* at 183.

¹¹¹ *Id.*

¹¹² Application for a Stay of the Injunction Issued by the United States District Court for the District of Maryland, *FDA v. American College of Obstetricians & Gynecologists*, 141 S.Ct. 10 (2020) (No. 20A34).

¹¹³ Reply in Support of Application for a Stay, *FDA v. American College of Obstetricians & Gynecologists*, 141 S.Ct. 10 (2020) (No. 20A34).

¹¹⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹⁵ See Michael A. Bailey, Policy and Legal Preferences of Supreme Court Justices (Sept. 4, 2020) (unpublished manuscript), https://michaelbailey.georgetown.domains/wp-content/uploads/2020/09/Court_Ideal_Update_July2020.pdf [<https://perma.cc/A27M-XASX>].

¹¹⁶ *June Medical Services, LLC v. Russo*, 140 S.Ct. 2103 (2020).

¹¹⁷ Lauren Fedor & Kadhim Shubber, *US Supreme Court strikes down restrictive Louisiana abortion law*, FINANCIAL TIMES (June 29, 2020), <https://www.ft.com/content/2bde10de-90e5-4a4f-a802-9b1dd9da1737> [<https://perma.cc/3RVB-T7ST>].

¹¹⁸ *June Medical Services, LLC v. Russo*, 140 S.Ct. 2103 (2020).

On October 8, 2020, the Supreme Court finally ruled in an unsigned *per curiam* neither to grant a stay nor to deny a stay. Instead, the Court remanded the case back to the District Court.¹¹⁹ The ruling stated that: [T]he Government seeks a stay of an injunction preventing the Food and Drug Administration from enforcing in-person dispensation requirements for the drug mifepristone during the pendency of the public health emergency. The Government argues that, at a minimum, the injunction is overly broad in scope, given that it applies nationwide and for an indefinite duration regardless of the improving conditions in any individual state. Without indicating this Court's views on the merits of the District Court's order or injunction, a more comprehensive record would aid this Court's review. The Court will therefore hold the Government's application in abeyance to permit the District Court to promptly consider a motion by the Government to dissolve, modify, or stay the injunction, including on the ground that relevant circumstances have changed . . . The District Court should rule within 40 days of receiving the Government's submission."¹²⁰

The context of this decision explains the immobility of the court. Justice Samuel A. Alito, Jr., joined by Justice Clarence Thomas, issued a dissent¹²¹ accusing the majority of inconsistency in its rulings on cases arising from the pandemic and of effectively deciding the case by failing to act. He argued that the District Court used the pandemic to expand *Roe*¹²². Justice Alito wrote, "[T]he District Court took a strikingly different approach. While COVID-19 has provided the ground for restrictions on First Amendment rights, the District Court saw the pandemic as a ground for expanding the abortion right recognized in *Roe v. Wade*."¹²³

Yet, Federal Judge Chuang did not change his ruling in his December 9 decision, writing that the pandemic circumstances have not changed and women will still have difficulties traveling to obtain a prescription for the pill regimen in-person.¹²⁴ On the December 14, 2020, the Trump Administration filed a supplemental brief¹²⁵ to the Supreme Court to preserve its abortion pill regulation, basing its arguments on 2020 increases in abortions in states where the regulations remained, and asking the Court to reverse the federal judge's injunction on the restrictions.

¹¹⁹ FDA v. American College of Obstetricians & Gynecologists, 141 S.Ct. 10 (2020) (mem.).

¹²⁰ *Id.* (citations omitted).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Michael Kunzelman, *Judge refuses to reinstate rule for dispensing abortion pill*, ASSOCIATED PRESS (Dec. 10, 2020), <https://apnews.com/article/public-health-abortion-coronavirus-pandemic-a00f804a4501d89309d6084f53125ccf> [<https://perma.cc/4RMR-6SHK>].

¹²⁵ Supplemental Brief in Support of Application for a Stay, FDA v. American College of Obstetricians & Gynecologists, 141 S.Ct. 10 (2020) (No. 20A34).

This case perfectly illustrates the political tension inherent to the issue of abortion, especially in pandemic times when both sides suspect the other of taking advantage of the situation to push their case. The fight to restrict medication abortions continues at the state level. Nineteen states require the clinician providing a medication abortion to be physically present when the medication is administered, thereby prohibiting the use of telemedicine to prescribe medication for abortion remotely. Senate Bill 260 passed in the Ohio House 54– 30 on December 17, after Republicans blocked debate. If signed by the governor, it would ban using telemedicine to provide abortions by requiring physicians to be physically present. Doctors who violate the law could face felony charges. When Republican Governor Mike DeWine signs the bill into law, Ohio will become the 20th state that requires a prescribing clinician to be in the presence of a patient when providing abortion medication.

In November 2020, Joe Biden was elected with the most votes ever cast for a presidential candidate in the United States.¹²⁶ More votes were cast in the 2020 presidential election than in any other U.S. election in history, and the turnout rate was the highest in more than a century¹²⁷, but rarely has American society been so divided. Against this background of social division, the issue of abortion occupies a major place, with political positions being poles apart on a more than ever divided and polarized political spectrums. Even in the most conservative states, less than three in ten believe abortion should be illegal in all cases.¹²⁸ Alexis de Tocqueville, in his book *Democracy in America*, theorized of the danger that threatens any democracy: that of despotism or the tyranny of a group over others.¹²⁹ Raymond Boudon said much more recently that “what threatens democracies . . . is the tyranny of minorities rather than the tyranny of the majority.”¹³⁰ The political battle has intensified recently with electoral legislation. The electoral legislation has a dual purpose: first, to attract the vote of a religious extremist minority which

¹²⁶ FEC, OFFICIAL 2020 PRESIDENTIAL ELECTION RESULTS (2020).

¹²⁷ Drew DeSilver, *Turnout soared in 2020 as nearly two-thirds of eligible U.S. voters cast ballots for president*, PEW RESEARCH CENTER (Jan. 28, 2021), <https://www.pewresearch.org/fact-tank/2021/01/28/turnout-soared-in-2020-as-nearly-two-thirds-of-eligible-u-s-voters-cast-ballots-for-president/> [https://perma.cc/SNF3-H6PR].

¹²⁸ *The State of Abortion and Contraception Attitudes in All 50 States*, PRRI (Aug. 13, 2019), <https://www.prii.org/research/legal-in-most-cases-the-impact-of-the-abortion-debate-in-2019-america/> [https://perma.cc/3SMZ-CGJM].

¹²⁹ Alexis de Tocqueville, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 1899).

¹³⁰ Raymond Boudon, *Que signifie donner le pouvoir au peuple?* ACADÉMIE DES SCIENCES MORALES ET POLITIQUES (Sept. 27, 2010), <https://academiciensciencesmoraletespolitiques.fr/2010/09/27/que-signifie-donner-le-pouvoir-au-peuple/> [https://perma.cc/NFM3-QBLZ].

positions religion above the Constitution and positive law, as well as above fundamental human rights as defined in international texts; second, to permit states to use a woman's body as the state's property and exploit it to generate a direct profit—namely, through an increase of population to ensure better representation of the state by exceeding the natural birth rate.

The political battle between both sides has unfolded into a new legal battle with an uncertain outcome during the novel coronavirus pandemic. Led by Texas, several states in the south and center of the country have included voluntary terminations of pregnancy (abortion) in the list of “non-urgent” medical interventions prohibited for as long as the COVID-19 epidemic is raging. Teleconsultation has spread widely due to travel restrictions, in theory allowing easier access to the abortion pill but quickly undermined by restrictions from the FDA regarding the in-person requirements for the abortion pill. At the local level, state executive and legislative branches further tightened access to the abortion pill by requiring the presence of a specialist doctor or the illegalization of the pill. Denouncing an instrumentalization of the health crisis for “ideological” purposes, abortion rights defenders urgently appealed to the courts so that clinics performing abortions could remain open and teleconsultation in abortion matters could continue.

Driven by technical advances in contraception, it is possible to pose to the public, in a renewed way, the question of the availability of oneself and one's. It is clear that the state continues to impose and exercise strong and unequal constraints on women's bodies through anti-abortion laws. As Thirteenth Amendment arguments become more familiar, the Thirteenth Amendment case for abortion will become less surprising . . . [and][t]he Thirteenth Amendment may again become a part of our constitutional conscience.¹³¹

About 250 federal judges were appointed during the Trump presidency, including a quarter of district (trial) court judges and about 30% of federal appeals court judges.¹³² With these appointments, pro-life supporters can at least limit the scope of *Roe v. Wade*,¹³³ which since 1973 has guaranteed access to abortion in the

¹³¹ Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 146 n.198 (1997); Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion 1 – 2* (Nw. U. Sch. L., Working Paper No. 32, 2010).

¹³² John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, PEW RESEARCH CENTER (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [<https://perma.cc/HQ72-DDAK>].

¹³³ *Roe v. Wade*, 410 U.S. 113 (1973).

name of the right to privacy. They also hope to obtain from the Supreme Court of the United States a decision reversing this jurisprudence definitively. Three of the nine Supreme Court justices appointed by President Trump each have strong pro-life beliefs: Neil Gorsuch (nominated in 2017), Brett Kavanaugh (nominated in 2018), and Amy Coney Barrett (nominated in 2020).¹³⁴ But the interpretation of the law and the analysis of a case may differ from the original doctrinal positions.

The first abortion case of the Amy Coney Barrett era, *FDA v. American College of Obstetricians and Gynecologists*, is now before the Supreme Court. During the pandemic, Chief Justice John Roberts has emphasized that courts should typically comply with public health officials, even when those officials interact with constitutional rights. It is thus very uncertain whether the Supreme Court will decide to make a significant incursion on abortion rights, but other possibilities will be provided with an important impact on reproductive rights in the country.