

Imani Gandy: Hello, fellow law nerds. Welcome to another special episode of Boom! Lawyered, a Rewire,News podcast hosted by the legal journalism team that really is just like, "What the fuck, y'all? What the fuck?" I'm Imani Gandy.

Jess Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web. The team legal podcast is part of that mission. So, a big thanks to our subscribers, welcome to our new listeners.

Oh my God, Justice Kennedy retired.

Imani Gandy: First of all, if this is the first time you've listen to this episode, I would encourage you to go and listen to other episodes, because this episode is going to be mostly me and Jessica going, AAAAAHHHHH. As if yesterday wasn't bad enough with the horrible ruling that we got. Then this morning, we get a terrible ruling in Janus, which essentially decimated public unions. Then, oh, Justice Kennedy just up and decided to retire. Jess, what happened?

Jess Pieklo: What happened is I think Justice Kennedy was done. I've talked a little bit about this from the arguments that we've seen. I've covered the court for a couple years, and I've been lucky enough to be in arguments. This year, especially, his body language, everything about it was most just done. What does it mean? It's going to be a mixed bag. We'll get into that, but in terms of what was he thinking, I don't know. I guess I was hoping that he would at least ride it out through midterms-

Imani Gandy: Right.

Jess Pieklo: ... so we could see what the what was, but I think the reality is he waited knowing the political climate that we have, knowing that we're in an election cycle, and he went for it anyway. So, it kind of is the final nail in the coffin that Kennedy was a moderate nonpartisan.

Imani Gandy: Yeah, and also, ultimately, what was the point of him? You know what I mean?

Jess Pieklo: Yeah.

Imani Gandy: He signed on-

Jess Pieklo: What is a Kennedy anyways?

Imani Gandy: Why is a Kennedy? But we got good opinions from him on key important cases. I don't want to detract from that. We got Whole Woman's Health, clutch, Lawrence v. Texas, clutch, Obergefell v. Hodges, clutch. But in terms of his legacy, he has always been about the dignity of LGBTQ people, right? He's talked about he's got this dignity jurisprudence where he has really been concerned about the well-being and dignity of LGBTQ people up to a point, not

far enough to where he's willing to deem them a suspect class or a protected class under the equal protection clause. But he's always concerned himself with LGBTQ people.

It seems to me given the climate that we're in, given the vice president that we have, Mike Pence, who is waging war against LGBTQ people, it seems very odd to me that he would pick this moment other step down when, essentially, he can almost be guaranteed that his LGBTQ legacy has just gone down the toilet.

Jess Pieklo: Right.

Imani Gandy: Are we going to go back to criminalizing sodomy? Doubtful. But are we going to-

Jess Pieklo: I don't know. I think we might.

Imani Gandy: You think we might?

Jess Pieklo: I think *Romer v. Evans* is one of the cases ... That's the one that undid the criminal bans on sodomy. I think that's one that's there.

McConnell, today right after the announcement, said that he is looking forward to voting to confirm Kennedy's replacement this fall. So, we know they're moving full steam ahead. What, if any chance, do the Democrats have of stopping a nomination, Imani?

Imani Gandy: I don't know. Honestly, I don't know. Do you know?

Jess Pieklo: I mean the magic formula would be this, and it is all of the stars really have to align. First of all, we have to keep all of the Democrats together. So, I'm looking at you, Manchin.

Imani Gandy: Exactly, I was about to say.

Jess Pieklo: So, all of the Democrats have to stay together, all of them, and we have to peel off two Republicans. So-

Imani Gandy: So, who we looking at? Collins?

Jess Pieklo: In theory, we've got Collins and Murkowski. Those are two women who are supposed to be pro-choice, but they voted for Trump's nominees that are anti-choice and anti-LGBT, so I don't know.

Imani Gandy: I was just about to say Collins and Murkowski, they showed up when it came to the ACA vote, but they pretty much backed Trump all the way. So, I don't know. It might be a matter of grassroots people really going full steam ahead to target ... And I *don't* mean target in a violent way, but I mean focus on Murkowski and Collins, and really make it clear to them that they may be standing between

whatever this struggling democracy we're trying to keep cobbled together now, and outright Christian Theocracy, which I know is something that you got in trouble on Twitter this morning for talking about, but it's like-

Jess Pieklo: All right -

Imani Gandy: Hit dogs will holler. If you were really that up in arms when Jessica tweets that we're on our way to a Christian autocracy, it's because you know it's true.

Jess Pieklo: Right. So, that's the scenario as it stands right now literally hours after Kennedy's announcement in terms of how or if there is a way to block it. So, yes, there would be a way to block a potential nominee, but wow, do we really have our work cut out ahead of us in order to do that. Doesn't mean that it's not impossible, but let's just take a real clear good look at this situation.

Imani Gandy: Right.

Jess Pieklo: So, we're going to assume that a nominee gets confirmed. One of the cases that everybody's already been talking about is obviously Roe v. Wade. Conservatives have been coming for abortion rights thinking that Kennedy was pretty soft on them, which he was to begin with. So, Imani, how many ways are we screwed when it comes to abortion rights, do you think?

Imani Gandy: So many ways because there's so many cases in the pipeline right now that attack exactly the restriction that we wanted to undo. I mean, hell, Whole Woman's Health just filed this massive lawsuit that basically challenges all of the crappy abortion restrictions that Texas has on the books. There are 20 week ban cases that are coming up through the federal courts. There are cases about forced ultrasounds that are coming up through the courts.

So, it's like I know ... A couple of years ago, a few years ago, I know I used to vent you about why there weren't more advocacy groups filing lawsuits about these statues. I don't want to throw any shade, whatsoever, on the fine lawyers who are litigating these cases. They are doing a marvelous job, but it does seem to me that some of these cases were filed about three years too late, because now we're in a situation where a lot of these cases that are coming up are going to land at the Supreme Court right when we have a solid 5-4 conservative majority.

So, no more reading the tea leaves and hoping Kennedy might have a decent wholesome breakfast and might decide that the rights of pregnant people are worth protecting in this country. We are literally going to get another Scalia, another Gorsuch who's going to be right down the road conservative. So now, it's just Kagan, Breyer, Ginsburg, and Sotomayor just writing dissents, just dissenting.

Jess Pieklo: Yeah.

Imani Gandy: That is very frightening to me.

Jess Pieklo: Yeah. So, you mentioned a couple cases that were in the pipelines. We've got some of those that are challenges to abortion access and rights, the 20 weeks bans, the trap laws that are still being litigated. We've got D&E bans. So, that's one pathway. They can just ram up a whole bunch of really terrible laws and decisions that effectively keep abortion legal in name only. So, that's the way you overturn Roe without overturning it, but then we've also got cases coming out of the 8th Circuit, where those judges have specifically said, "We want to uphold abortion restrictions like North Dakota's 6 week ban, but we can't because the stupid Supreme Court hasn't overturned Roe yet. So, will you guys just get on with it and do that?"

Imani Gandy: Yeah. Yeah.

Jess Pieklo: So, we already have federal courts of appeals that are packed with conservative men mostly, a few women, but mostly men, who have said, "Hey SCOTUS, we want you to overturn Roe v Wade. We're giving you every opportunity to do so." So, I think we're going to see a lot of activity in the federal courts over the next 18 months on this.

Imani Gandy: Yeah. Also, the only real thing that is stopping the Supreme Court from just wholesale reversing Roe v. Wade is that usually the court values precedent. It values stare decisis, which is this rule that you fucking follow precedence essentially. That's the actual Latin translation.

Jess Pieklo: It is.

Imani Gandy: You fucking follow precedent. But just today in Janus, the court overruled a 40 year precedent.

Jess Pieklo: Yes.

Imani Gandy: So, it's like clearly the court does not have as much respect for precedent as it has had in the past. That is because we have a court that is more ideologically split than I think ever before, and justices-

Jess Pieklo: I'd agree with that.

Imani Gandy: And justices are willing to actually contort the law to fit prefab agendas. Thomas' opinion in NIFLA yesterday made no goddamn sense, except for the fact that he doesn't like abortion. He's very, very "pro-life," and he wanted to make sure that the outcome was the way he wanted it. I think we can expect a lot more of that.

Jess Pieklo: Absolutely. So, we talk a little bit just now about what Kennedy's retirement likely means for abortion rights and the legacy of Roe v. Wade. It's going to be

pretty bad in a couple other areas too. What are some cases or areas that you see really coming under threat now that Kennedy, as waffle-y as he was, is gone?

Imani Gandy: There's a case right now coming up through the 2nd Circuit about whether or not LGBTQ people are a protected class, whether or not sexual orientation is a category under Title VII that you cannot discriminate against. I think we had a pretty decent chance of finally telling LGBTQ people, "Yes, being gay or trans is an immutable characteristic just like being black or being a woman, and you deserve some sort of heightened scrutiny when there are laws passed that strip you of your civil rights." Well, that's out the window. There's certainly no way a conservative court, a Trump court, is going to care about the rights of LGBTQ people.

Jess Pieklo: Yeah.

Imani Gandy: So, that means these laws about keeping trans people out of the bathroom are going to be passed and upheld with reckless abandon. There's going to be no protection in the workplace for gay and trans people. We can kiss voting rights goodbye. The court has been waiting to decide whether or not racial gerrymandering is a problem. They said it's a problem. They've said it's against our democratic principles, but they haven't quite figured out what to do about it yet. So, they just keep kicking these cases back down to the lower courts.

By the time they make it back up to the Supreme Court, forget it. Gorsuch and Thomas already said that they don't think racial gerrymandering is a violation of the Voting Rights Act, not of the 15th amendment. Pardon me. So, it's like pretty much every social justice area, every area that we care about, that any reproductive justice advocate, racial justice, immigration justice, any kind of justice advocate cares about, all of those issues are on the line. That is a depressing thing to have to tell you listeners. I wish I could rock you on my bosom and sing you a church song, and perhaps feed you cookies, but I can't because we're fucked.

Jess Pieklo: If I had to tick three cases right now off the top of my head that social conservatives are really going to be gunning for in terms of undoing precedent now that Kennedy's retired, I would pick *Griswold v. Connecticut*, which-

Imani Gandy: Oh god. Oh, no.

Jess Pieklo: They're coming for *Griswold*. They're coming for your birth control. They've already stacked HHS with these advocates you don't believe that you have a right to it, and think that it is demon science. So-

Imani Gandy: I haven't even thought about *Griswold*.

Jess Pieklo: Conservatives have already called me bananas on Twitter for this, but whatever. I'm just making them mad because I'm telling them what I'm not supposed to say. They're coming for Griswold in my opinion. I've already mentioned Obergefell and marriage equality. They've been coming for that-

Imani Gandy: Yeah.

Jess Pieklo: ... since it happened. We knew that, but I think similar to the path of Roe and Griswold, that they are going to reach so far as to go back to try and criminalize sodomy, or at least find a way to enforce sex laws in a way that we haven't seen since the late 70s and early 80s unfortunately. So, it's like the worst of the Reagan administration is going to come and reanimate itself right now.

Imani Gandy: Yeah. There have been a couple of white dudes on Twitter who have been saying, "I think it's really hyperbolic to say that we're a few steps away from the Handmaid's Tale," but if you think about telling people that they can't use contraception, if you think about telling LGBTQ that they don't have a right to exist essentially, like what-

Jess Pieklo: If the government is swooping in and taking babies away from their parents and not accounting for it.

Imani Gandy: And if the government is swooping into your bedroom and determining what kind of sexual relations you can or cannot have with your partner, how is all that different from that horrible Handmaid's Tale type lifestyle ... type scenario. That's not a lifestyle. The Handmaid's Tale, it's a lifestyle. I really think that people aren't alarmed enough about what's going on.

I want to bring up one more thing before we wrap up. Constitutional convention. We are a couple of Republican controlled states away from a constitutional convention. ALEC has been gunning for one. If there's a constitutional convention and the constitution is amended to say that marriage is between a man and a woman, and to say that whatever-

Jess Pieklo: Life begins at conception.

Imani Gandy: That life begins at conception, and to somehow incorporate some immigration rule into the constitution so that we actually ban immigrants based on race, color, creed, whatever. We're in a world of hurt. I just really hope that everyone who listens to this understands that we are in a really serious moment right now, and to talk to the people in your family, and your friends, and your circle about how serious it is and how important it is to vote. Actually, voting might not make a difference anyway because we might be too far gone, but we can try to stop the bleeding by fucking voting.

Jess Pieklo: Yeah, really, and you got to do something. All right. So, it's been a heck of a week. Two emergency podcasts back to back. The very end of the term ... We

haven't even done our wrap-up. We've still got that for you guys coming up. As always, we appreciate the support and you guys listening. We are here to help get you through the highlights, and most definitely, the low lights of the Gorsuch court. Thank y'all.

Imani Gandy:

Stay sane.

Jess Pieklo:

Boom! Lawyered is created and hosted by Imani Gandy and Jessica Mason-Pieklo. The show is produced by Nora Hurley. Our executive producer is Marc Faletti and our editor in chief is Jodi Jacobson.