

[We'll Hear Arguments podcast — Being Born Kind of Matters: Roe v. Wade, Episode 1](#)

Jessica Pieklo:

You know what I love, Imani?

Imani Gandy:

What's that, Jess?

Jessica Pieklo:

A good courtroom drama.

Imani Gandy:

You mean like My Cousin Vinny? [movie clip]

Jessica Pieklo:

No. I mean, yes, I love that movie with every ounce of my being. And do you remember LA Law? [program clip]

Imani Gandy:

Okay, Boomer. Just kidding! I totally watched LA Law as a kid. What about Boston Legal? I used to love James Spader's closing arguments. They were Spaderific, if I may coin a term. [program clip]

Jessica Pieklo:

That's a fun one too. But Imani, what if the greatest courtroom drama was right in our own backyard?

Imani Gandy:

Oh, there are so many streaming services, Jess. Which one do I need to get now?

Jessica Pieklo:

None. I'm talking about in real life, right here in the real world.

Imani Gandy:

Well, if whatever you're talking about were to qualify as a courtroom drama, they'd have to talk about murder.

Justice Thurgood Marshall:

Well, could the state of Texas say that if it's for the benefit of the health of the wife that you kill the husband?

Jessica Pieklo:

And sex, probably with some shame mixed in.

Jay Floyd:

I think she makes her choice prior to the time she becomes pregnant.

Imani Gandy:

There would have to be some humor, including some colossal goofs.

Robert Flowers:

Your honor, it seems to me that the physical act of being born, and I'm not playing it down, all right, but what changes? Is it a nonhuman and changing by the act of birth into a human?

Justice Stewart:

Well, that's been the theory up until now in the law.

Jessica Pieklo:

What about a sexist antagonist?

Jay Floyd:

Mr. Chief Justice, may it please the court, it's an old joke, but when a man argues against two beautiful ladies like this, they're going to have the last word.

Imani Gandy:

And, most importantly, a hero. Someone who makes great arguments and stands up for the people the system beats down.

Sarah Weddington:

So a pregnancy, to a woman, is perhaps one of the most determinative aspects of her life. It disrupts her body. It disrupts her education. It disrupts her employment, and it often disrupts her entire family life. She should be allowed to make the choice as to whether to continue or to terminate her pregnancy.

Imani Gandy:

Hey, I know that voice. That's Sarah Weddington, the Texas attorney who argued on behalf of Jane Roe, aka Norma McCorvey! That's her in Roe versus Wade at the Supreme Court. I still cannot believe that she was only 26 at the time.

Jessica Pieklo:

And that sexist antagonist, that was Jay Floyd, who defended the Texas abortion ban the first time Roe was argued in 1971. His half-baked joke is considered one of the most offensive moments in Supreme Court history, and he made it with his very first sentence.

Imani Gandy:

And it's wild that Roe was argued twice, once in 1971 and again in 1972.

Jessica Pieklo:

And the guy who defended the Texas abortion ban the second time, Robert Flowers, he was the guy who tried to imply that being born is like totally no big deal.

Imani Gandy:

Okay, so what you're telling us is that Supreme Court arguments are some serious real-life courtroom drama.

Jessica Pieklo:

And that's especially true when they were arguing Roe versus Wade and basically every reproductive rights case before and since.

Imani Gandy:

We've got to bring these arguments to life, Jess! We should dissect them. We should debate them.

Jessica Pieklo:

We should celebrate the brilliant moments.

Imani Gandy:

And definitely cringe at the worst ones.

Jessica Pieklo:

Okay, spoiler alert. That's why we're here, Imani!

Imani Gandy:

What?!

Jessica Pieklo:

Welcome to our new podcast series that will do all of the above -- and then some.

Imani Gandy:

Think of this show as Mystery Science Theater 3000 meets our regular podcast, Boom! Lawyered. There's so much to learn from what happened at the Supreme Court and so much to unpack. We're going to walk you through all of it, one crucial moment at a time.

Jessica Pieklo:

I'm Jessica Mason Pieklo.

Imani Gandy:

I'm Imani Gandy. As legal journalists at Rewire.News, Jess and I have covered more about abortion rights in the courts than anyone else anywhere else. We couldn't be more excited to bring you this new series.

Jessica Pieklo:

And now we'll hear arguments.

[Title montage]

Imani Gandy:

Welcome to our new series where we bring Supreme Court arguments to life and put them in context.

Jessica Pieklo:

Each season we'll focus on one case, and for season one, of course, we had to focus on Roe versus Wade. So here's how this series works. Roe was argued twice -- in 1971 and 1972. That's because there were only seven sitting justices the first time, and there was a ton of disagreement on how to proceed. So they did it all again after Nixon added William Rehnquist and Lewis Powell to the court.

Imani Gandy:

We're going to jump back and forth between the two sessions as we break down the arguments.

Jessica Pieklo:

That's for two reasons. One is that a lot of the arguments from one session relates so closely to the ideas in the other that it's important to tie them together.

Imani Gandy:

And the other is that, honestly, Supreme Court arguments and questioning aren't always super organized. They can be messy and all over the place, especially when the attorneys arguing the case for Texas didn't seem to know what they were even doing there. They were like, "What? What? Where am I? The Supreme Court? Crap. I better argue some stuff then." I mean, Jesus, these dudes are something else. But never fear. Jess and I are going to cut through the BS and get to the nugget of these legal arguments. How does that sound to you, Jess?

Jessica Pieklo:

That sounds amazing, Imani.

Imani Gandy:

Before we get into the constitutional nitty gritty, we should explain exactly what Roe v. Wade was about.

Jessica Pieklo:

Oh, I know this one! It was about abortion.

Imani Gandy:

Jess, it is way too early in the episode for you to be this way, but yes, it was about abortion. Specifically, the lawsuit challenged a Texas statute that criminalized abortion by prohibiting any person from performing an abortion by using drugs or medicine or from using any violence to procure an abortion. There was one narrow exception. A person could perform an abortion if the abortion was needed to save the life of the pregnant person. Now, the penalty for violating the statute was two to five years in prison or double that if the abortion was performed without the pregnant person's consent. Now, this is pretty noteworthy given the penalties that some states are trying to enact today, like capital punishment or life imprisonment.

Jessica Pieklo:

And Texas's primary defense of the law centered on one idea: that a fetus is a person, and therefore the state has an interest in protecting it. And everyone in the courtroom was obsessed with the concept of personhood.

["person" clip montage]

Jessica Pieklo:

So that's what we're going to focus on in this first episode, the intense debate in Roe versus Wade over whether a fetus is a person under the law.

Imani Gandy:

Well, I don't think a fetus is a person, but I'm not the final arbiter of these things, even though, let's be honest, maybe I should be. That would be a little document called the Constitution. So what does it say? How does the Constitution define the concept of person?

Jessica Pieklo:

That's exactly what Justice Potter Stewart asked Robert Flowers in 1972. He was the Texas lawyer defending the law. To be more specific, Stewart basically tried to stunt on Flowers and, well, listen for yourself.

Justice Stewart:

Do you know of any case anywhere that's held that an unborn fetus is a person within the meaning of the 14th Amendment?

Robert Flowers:

No, sir. We can only go back to what the framers of our Constitution had in mind.

Justice Stewart:

Well, these weren't the framers that wrote the 14th Amendment. That came along later.

Robert Flowers:

No, sir. I understand, but the Fifth Amendment. Under the Fifth Amendment, no one shall be deprived of rights to life, liberty, and property without the due process of law.

Justice Stewart:

Yes, but then the 14th Amendment defines person, and it defines person as somebody who's born, doesn't it?

Robert Flowers:

I'm not sure about that.

Justice Stewart:

Well, I know it does. Any person born or naturalized in the United States, doesn't it? I suppose that's not a definition of a person, but that's a definition of a citizen.

Imani Gandy:

Oh my God. Jess, can you imagine being a Supreme Court justice?

Jessica Pieklo:

I can actually.

Imani Gandy:

Okay, me too. But can you imagine being up there lording over the land with your unparalleled knowledge of the Constitution and then completely getting the basics wrong in front of a full courtroom?

Jessica Pieklo:

Seriously, I cringed. I'm still cringing. But also, to be fair, this is a sticky wicket because the Constitution talks a lot about persons, but defining them is another story.

Imani Gandy:

Okay, then let's put on our Sherlock Holmes caps and dig in. Justice Stewart really seemed to believe that the 14th Amendment was the key here. So what does the amendment say exactly?

Jessica Pieklo:

It's a little clunky, but stick with me. Here's what section one of the 14th Amendment says. "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside."

Imani Gandy:

So that means if you're born in this frigging country or naturalized in this frigging country and you're subject to this frigging country's laws, then you're a citizen of this frigging country and of the frigging state in which you live.

Jessica Pieklo:

You serving as the Constitution's anger translator, Imani, is just what this podcast series needs.

Imani Gandy:

Happy to serve. But why don't you continue with section one of the 14th Amendment?

Jessica Pieklo:

Okay. It says, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Imani Gandy:

States basically have to leave citizens the hell alone. You can't deprive them of life. You can't deprive them of liberty. You can't deprive them of property, and you have to treat them equally, dagnabbit.

Jessica Pieklo:

Another important detail is that the 14th Amendment is one of the amendments known as a Reconstruction Amendment.

Imani Gandy:

As you can probably guess, that's because it was passed during the Reconstruction era at the end of the Civil War.

Jessica Pieklo:

I'm also going to go out on a limb here and say that it's one of the most important constitutional amendments we have.

Imani Gandy:

As a black woman, it's certainly one of my personal favorites. After all, it's got the Equal Protection Clause in it. And who doesn't love the Equal Protection Clause, besides like white supremacists and other assorted racist assholes? But the 14th Amendment also made federal due process guarantees apply at the state level.

Jessica Pieklo:

In other words, state laws can't violate your right to life and liberty. The Constitution protects you from losing your life, liberty, or property rights without quote-unquote due process.

Imani Gandy:

Due process is lawyer speak and means that the government can't, say, throw you in jail without going through certain procedures, like letting you know what charges you face and why. That's because putting someone in jail deprives them of their liberty. They can't go live life the way they were living before jail.

Jessica Pieklo:

So the 14th Amendment guarantees that states have to follow certain procedures before stepping on your constitutional rights. That's the Due Process Clause. It also says that laws have to apply to all people the same. That's the Equal Protection Clause. The law is supposed to treat everyone equally.

Imani Gandy:

Okay, Jess, so when does the 14th Amendment kick in?

Jessica Pieklo:

What do you mean, when does the 14th Amendment kick in?

Imani Gandy:

Like, when does it kick in the door like the Kool-Aid Man? "Oh, yeah, I'm the 14th Amendment!"

Jessica Pieklo:

Imani, it is too early for *you* to be this way.

Imani Gandy:

Touche! So when I ask, "When does the 14th Amendment kick in?" I mean at what point in a person's existence does that person have 14th Amendment rights?

Jessica Pieklo:

That's what we're trying to figure out.

Imani Gandy:

Jess, please don't turn this into a whole who's-on-first debacle.

Jessica Pieklo:

I really won't, I swear.

Imani Gandy:

Then take us through the 14th Amendment closely again to find out when it kicks in. Oh, yeah.

Jessica Pieklo:

Like the Kool-Aid Man?

Imani Gandy:

Exactly.

Jessica Pieklo:

So there are two concepts here. First is the idea that anyone born in the US is a citizen. That's important. That first sentence in the 14th Amendment clearly says that when you are born in this country, you have rights. Birth is the constitutional marker here.

Imani Gandy:

Cue Jim Halpert stare directly at Donald Trump, who has threatened to end birthright citizenship via executive order as if he can just change the Constitution willy nilly. But we digress. After that first sentence, which establishes birthright citizenship, there are two clauses that talk about due process and equal protection rights. Those clauses don't use the word citizen. They use the word person.

Jessica Pieklo:

And that's what trips Justice Stewart up. The 14th Amendment talks about persons, but it doesn't define them.

Imani Gandy:

Well, what about Texas law? Does Texas law have anything to say about persons?

Jessica Pieklo:

Justice Stewart wondered that same thing.

Justice Stewart:

Does Texas law, in other areas of the law, give rights to unborn children in the areas of trusts and estates and wills or any other area of the law?

Sarah Weddington:

No, your honor. Only if they are born alive.

Jessica Pieklo:

So there was nothing to point to in Texas law that gave any alive breathing-person rights to the unborn.

Imani Gandy:

Okay, then, so what would it mean if a fetus is a person under the Constitution?

Jessica Pieklo:

That's what Sarah Weddington was asked to wrestle with in 1971, and it kind of goes to a dark place. Listen.

Justice Stewart:

If it were established that an unborn fetus is a person within the protection of the 14th Amendment, you would have almost an impossible case here, would you not?

Sarah Weddington:

I would have a very difficult case.

Justice Stewart:

You certainly would. This would be the equivalent of, after a child was born, if the mother thought it bothered her health having a child around, she could have it killed. Isn't that correct?

Sarah Weddington:

That's correct.

Imani Gandy:

Oh, come on! Couldn't Weddington have pushed back a little or something? Couldn't she have said something like, "Hey, man, that's a little callous to equate pregnant people in need of healthcare to a mom just offing her eight-year-old"? Couldn't she have said something, anything? Seriously!

Jessica Pieklo:

I mean, on the one hand, this is a tough idea to concede like that. It hurts. But on the other hand, from a purely constitutional perspective, she kind of didn't have a choice but to concede Stewart's point here. If the court were to declare a fetus to be a person under the 14th Amendment, then the abortion-equals-murder framing becomes possible.

Imani Gandy:

Maybe, but maybe not. Weddington conceding the point that she wouldn't have a case may have been true in 1972, but that's not necessarily true today.

Jessica Pieklo:

Wait, why is that, Imani?

Imani Gandy:

Because in the words of one Mitt Romney, corporations are people too, my friend -- and that is my best Mitt Romney impression. It is very dull because Mitt Romney is very dull.

Jessica Pieklo:

Oh, yes, Citizens United.

Imani Gandy:

Boo, Citizens United. Boo! Bow down to the queen of filth, to the queen of slime, to the queen of muck. Boo! Boo! Okay, while I boo, why don't you take a brief aside and explain what Citizens United is?

Jessica Pieklo:

Citizens United versus FEC is the 2010 Supreme Court decision that declared corporations are people under the Constitution. And because they are people under the Constitution, corporations have certain constitutional rights, like the right to free speech. It is a bonkers, terrible decision.

Imani Gandy:

But it's not just Citizens United. It's Hobby Lobby, too.

Jessica Pieklo:

Oh, another bonkers, terrible decision. Okay. Burwell versus Hobby Lobby, the 2014 case where the court decided it's hunky dory to allow corporations to take on the religious beliefs of their human owners because, Imani, if a corporation has free-speech rights, it definitely has religious rights too.

Imani Gandy:

Brick-and-mortar buildings can believe in Jesus too, Jess, and I feel like you're infringing on my sincerely held religious beliefs that corporations have religious rights, and it just like... It hurts my feelings.

Jessica Pieklo:

Imani, I'm sorry. And I really appreciate you calling me in like that. It's a new year, and I'm really striving to be a better person. And so even though I might think it's ridiculous, under the Roberts court, brick-and-mortar buildings can believe in Jesus. Okay, but I'm confused about what Citizens United and Hobby Lobby has to do with declaring a fetus a person under the 14th Amendment. I mean, how does any of that work, Imani?

Imani Gandy:

So before Sarah Weddington's colloquy with Stewart... that's the moment where she conceded that she would have a difficult case if fetuses were determined to be persons under the 14th Amendment... she had an illuminating back-and-forth with Justice White that pushes back against the suggestion by the justices that if a fetus is a person, she loses her case.

Justice White:

Well, what if a... Would you lose your case if the fetus was a person?

Sarah Weddington:

Then you would have a balancing of interest.

Justice White:

But you still... You have anyway, don't you?

Sarah Weddington:

Excuse me?

Justice White:

You have anyway, don't you? You're going to be balancing the rights of the mother against the rights of the fetus.

Imani Gandy:

For decades, anti-abortion advocates have believed that declaring a fetus a person would trigger a balancing of interests that would benefit the fetus.

Jessica Pieklo:

And that's BS. But we're getting ahead of ourselves because we're still arguing over whether a fetus is a person. Remember, the Constitution opens the door.

Imani Gandy:

I'm not so sure it does, Jess, at least not according to William Blackstone.

Jessica Pieklo:

Wait, Imani, William Blackstone? Nobody is going to know who that is. And honestly, what does William Blackstone have to do with any of this?

Imani Gandy:

So Billy Blackstone...

Jessica Pieklo:

Billy Blackstone! What?!

Imani Gandy:

You know, Billy Ray Blackstone!

Jessica Pieklo:

He performs in the Ozarks, doesn't he?

Imani Gandy:
Yeah, he does.

Jessica Pieklo:
Catch him at Sturgis!

Imani Gandy:
So Billy Blackstone is kind of a big deal, Jess. He's one of those really important white dudes from the 18th century, you know, the ones who wore the wigs and the tights and those Pilgrim shoes with the big buckles. He's basically the granddaddy of black letter law. Now, without boring you with a history lesson about ye olde English law, let's just say that Blackstone believed that a living natural person is a person. The idea that a fetus is a person would have been foreign to him. And the idea that a fertilized egg is a person, yo, Billy Blackstone would have been like, "What?"

Jessica Pieklo:
So what you're saying is that the Constitution doesn't exist in a vacuum. Part of the reason it doesn't define person is because it was self-evident to leading thinkers, like William Blackstone, that you're only a person when you're born. So there was no need to talk about fetuses at all.

Imani Gandy:
Exactly. If the Supreme Court were to decide that everything from fertilized eggs to a fetus on the verge of shooting out of the womb are persons, then the court has created a new category of person.

Jessica Pieklo:
Just like the court did in Citizens United when it decided that corporations were persons for purposes of the First Amendment.

Imani Gandy:
Right. Or when the court decided in Hobby Lobby that corporations have religious rights.

Jessica Pieklo:
So basically fetuses are corporations. That's the takeaway.

Imani Gandy:
I mean, kind of. From a legal standpoint, fetuses are more like corporations than they are like people. Look, it's a weird thing to say, I know, but think about it. Rights attach at birth, meaning all the rights in the Constitution and natural law and wherever the hell else rights come from, those rights attach when you are born, not when you're conceived, not when your mom and your dad laid down by the fire to make sweet love. A fertilized egg or a fetus doesn't have the right to free speech or the right to be treated equally or the right to bear arms.

Jessica Pieklo:
But what if they did?

Imani Gandy:

What if they did what?

Jessica Pieklo:

Had the right to bear arms?

Imani Gandy:

Jess, are you asking me whether fetuses have the right to bear arms? Like, what if there were a gang of fetuses getting into a shootout in a bank, like in Heat? A little Al Pacino fetus is having coffee in a diner with a little Robert De Niro fetus! And the bank-robber fetuses are having a shootout with the cops that are also fetuses, and everybody is bearing arms.

Jessica Pieklo:

Oh, God. Now I can't stop thinking about a bunch of fetuses getting into a shootout at a bank.

Imani Gandy:

Look, Jess, in this gun-loving country, anything is possible.

Jessica Pieklo:

Okay, let's get back on track here. So fetuses weren't considered people back in the olden times, and creating new kinds of persons is really problematic. So then Texas must have had a good argument for why a fetus should be considered a person.

Imani Gandy:

You would think, and that's what Justice Stewart wants to know from Robert Flowers. You heard a bit of this in the intro, but here's the whole back-and-forth.

Justice Stewart:

Now, generally speaking, I think you'd agree that up until now, the test has been whether or not somebody has been born or not, and that's the word used in the 14th Amendment.

Robert Flowers:

Yeah, sure.

Jessica Pieklo:

Just a quick pause to note, Flowers just agreed that up until now the law has only ever applied to alive, breathing people, not fetuses. But let's continue.

Justice Stewart:

That's what would keep the legislature, I suppose, from classifying people who've been born as not persons.

Robert Flowers:

Your Honor, it seems to me that the physical act of being born, and I'm not playing it down, all right, but what changes? Is it a nonhuman and changing by the act of birth into a human?

Justice Stewart:

Well, that's been the theory up until now in the law.

Robert Flowers:

Well, in other words, it has been the theory that we have deriving from non-human material a human being after conception. Well, Your Honor-

Justice Stewart:

See, that's the reason I asked you at the beginning, within what framework should this question be decided? Should it be a theological one or a philosophical one or a medical one that we can find here for dealing with...

Robert Flowers:

I think, Your Honor, that the court-

Justice Stewart:

... the traditional meaning of it.

Robert Flowers:

I wish I could answer that. I believe that the court must take these, the medical research, and apply it to our Constitution the best it can.

Jessica Pieklo:

Okay, this is bananas. First of all, Stewart is right. Being born is an important marker in terms of being a person, and Texas was asking the court to change that. Also, it is remarkable that the state of Texas was asking the Supreme Court to declare a fetus a person, but couldn't point the justices to a path to do so.

Imani Gandy:

Remarkable. Like I said in the beginning, these dudes are kind of terrible at this whole oral-arguments-before-the-highest-court-in-the-land business. Flowers's argument boils down to lawmakers in Texas believe life begins at conception and that a fetus is a person, so you folks figure out the rest. And if the court doesn't want to answer the question of who is a person under the Constitution, Flowers offers up an alternative which, yikes, check this out.

Robert Flowers:

But I find no way that I know that any court or any legislature or any doctor anywhere can say that here is the dividing line, here is not alive and here is alive after conception. Perhaps it would be better left to our legislators. There, they have the facilities to have some type of medical opinion brought before them and the opinion of the people who are being governed by this.

Justice Stewart:

If you're right that an unborn fetus is a person, then you can't leave it to the legislature to play fast and loose with that in dealing with that person.

Jessica Pieklo:

Thank goodness for Justice Stewart here. I mean, let's sit with Flowers's argument for a minute. He thinks it would be just fine to let states decide on their own who is a person and who is not. State lawmakers! Now, I know some excellent people who are state lawmakers, and every single one of them would tell you there is no chance, not a single chance they should be making that kind of pronouncement.

Imani Gandy:

And being a person isn't a state-by-state inquiry. Take Flowers's logic to its ultimate conclusion, and it would be possible to be a person in Texas but not in California. That is constitutional chaos and not how it works.

Jessica Pieklo:

In both the 1971 and 1972 arguments, Justice Thurgood Marshall really challenged Texas to justify its definition of a person. Here's an exchange between Marshall and Jay Floyd in 1971, where Marshall presses Floyd to show his work, so to speak, to support the claim that life begins at conception.

Jay Floyd:

We say there is life from the moment of impregnation.

Justice Marshall:

And do you have any scientific data to support that?

Jay Floyd:

Well, we began, Mr. Justice, in our brief with the development of the human embryo, carrying it through to the development of the fetus from about seven to nine days after inception.

Justice Marshall:

What about the first six days?

Jay Floyd:

We don't know.

Justice Marshall:

But the statute goes all the way back to one hour.

Jay Floyd:

I don't... Mr. Justice, there are unanswerable questions in this field. I...

Imani Gandy:

That's just an incredible flame-out by Floyd at the end there. He's got nothing!

Jessica Pieklo:

Nothing! And in 1972, the justices would press Robert Flowers on this same point. Justice Marshall asked Flowers if there was any medical consensus on when life began, and Flowers's answer blows my mind.

Justice Marshall:

Now, you're not quoting a judge. I want you to give me a medical... a recognizable medical writing of any kind that says that at the time of conception that the fetus is a person.

Robert Flowers:

I do not believe that I could give that to you without researching through the briefs that have been filed in this case, Your Honor. I'm not sure that I can give it to you.

Imani Gandy:

Seriously? Flowers actually said he'd have to read the briefs and get back to him on that, which really? Don't you think that's something you should have had an answer for before you stepped up to argue before the Supreme Court of the goddamn United States?

Jessica Pieklo:

I know, right? Now, ultimately the court concluded arguments with no clear sense from the justices as to how they'd come out on the issue of whether or not a fetus was a person under the Constitution.

Imani Gandy:

It wouldn't be until the court issued its opinion in January, 1973, ultimately affirming a right to an abortion, that it would also declare the 14th Amendment does not apply to the quote-unquote unborn.

Jessica Pieklo:

So for now, a fetus is not a person under the Constitution, but since the court's decision in Roe, anti-choice advocates have been laser focused on upending that declaration. It's entirely possible we will see the Supreme Court asked to revisit this idea, and that's why it's so important to deepen our understanding of Roe versus Wade today.

Imani Gandy:

Absolutely. With a solidly anti-abortion majority of justices currently on the bench, the court very well may declare fetuses, just like corporations, have constitutional rights.

Jessica Pieklo:

Okay. I feel like we need a recap because all I know is we started out talking about abortion, and now a fetus is a corporation. So what happened, Imani?

Imani Gandy:

Easy does it, Jess. A fetus isn't actually a corporation, at least not yet. Just kind of like a corporation, more corporation-y than person-y. But a recap is still a good idea, so let's do it.

Jessica Pieklo:

In this episode, we discussed the 14th Amendment and its due-process and equal-protection guarantees.

Imani Gandy:

And we talked about how those guarantees are for persons. But who is a person? The 14th Amendment doesn't say.

Jessica Pieklo:

Texas argued life begins at conception, and therefore, the quote-unquote unborn are people under the Constitution. Texas's attorneys also argued that, because the unborn are people under the Constitution, that states have the power to ban abortion as a result. Texas didn't offer any evidence to support this argument, but its attorneys made it anyway. Jay Floyd did in 1971, and Robert Flowers really doubled down on it in 1972.

Imani Gandy:

Meanwhile, Sarah Weddington said, "Well, actually no. A fetus is not a person under the Constitution." And she offered a bunch of examples from other parts of the law and history to show that nobody ever thought a fetus was a person until Texas started making shit up.

Jessica Pieklo:

But the court refused to answer the question of when life begins. And because person remains constitutionally murky, anti-choice advocates have seized on this idea of fetal personhood as the crux of their multi-decade strategy to upend legal abortion, which is coming to a head now, right now in this present day.

Imani Gandy:

That was a great summary, Jess.

Jessica Pieklo:

It was.

Imani Gandy:

Good job by us.

Jessica Pieklo:

But Imani, let's say that the court were to decide a fetus is a person anyway. Wouldn't that be the end of the entire case?

Imani Gandy:

Oh, hell no. Remember earlier, Sarah Weddington was ready for this.

Justice Stewart:

Would you lose your case if the fetus was a person?

Sarah Weddington:

Then you would have a balancing of interest.

Jessica Pieklo:

Oh, right! So then it's like a battle of rights between the fetus and the pregnant person. I have a feeling those arguments got pretty intense too.

Imani Gandy:

They sure did, and that's what we're going to talk about in our next episode, the arguments over whose rights should matter most. The alive, breathing pregnant person or the fetus?

Jessica Pieklo:

We'll hear arguments as created by Jessica Mason Pieklo, Imani Gandy, and Marc Faletti

Imani Gandy:

Jess and Imani write and host the series. Marc produces and edits it for Rewire.News.

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Original music is composed by Douglas Helsel.

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We'll Hear Arguments was recorded at Side 3 Studios in Denver, Colorado, with Kyle Smith as our recording engineer. All Supreme Court audio is available from oyez.org under the Creative Commons Attribution-NonCommercial 4.0 International License.

Jessica Pieklo:

And finally, a big thank you to everyone at Rewire.News for supporting and promoting We'll Hear Arguments.