

[We'll Hear Arguments podcast — A Great Balancing Test: Roe v. Wade, Episode 2](#)

Jessica Pieklo:

Hey Imani, remember in our first episode when we explored the arguments in Roe v. Wade over whether a fetus was a person?

Imani Gandy:

I do. And I remember Sarah Weddington was pretty convincing as to why they shouldn't be considered persons, and why the pregnant person was the "person" the court should be protecting.

Jessica Pieklo:

Yeah, well apparently Justice Byron White was less than convinced. Listen to this line of questioning he posed to Robert Flowers the second time was Roe was argued in 1972.

Justice White:

If you're correct that the fetus is a person, then I don't suppose you'd have a-- the state would have great trouble permitting an abortion, wouldn't it?

Robert Flowers:

Mm-hmm (affirmative), yes sir, it would.

Justice White:

In any circumstance.

Robert Flowers:

It would, yes.

Justice White:

To save the life of the mother, or her health, or anything else?

Robert Flowers:

Well, there would be the balancing of the two lives, and I think that-

Justice White:

What would choose? Who would you choose to kill? The innocent one, or what?

Imani Gandy:

Oh my God, did Justice White just ask, "Would you choose to kill the innocent one," as if between a pregnant person seeking an abortion, and the "unborn child", the innocent one is always the unborn child?

Jessica Pieklo:

He did, and the implications of his assertion are downright repulsive, because if the fetus is always "the innocent one", then by definition that makes the pregnant person what? The guilty one? The dirty one? The sinner for daring to have sex?

Imani Gandy:

Probably the promiscuous slut who should have just kept her legs closed. But, how did Sarah Weddington respond? Surely, she didn't look the other way on this.

Jessica Pieklo:

She most certainly did not. That's what we're going to explore in this episode, the fight over whether and how to balance the rights of a pregnant person against the rights of a fetus.

Imani Gandy:

Because even if you decide that for some reason a fetus is a person, that is far from the end of the debate about whose rights matter the most.

Jessica Pieklo:

I'm Jessica Mason Pieklo.

Imani Gandy:

I'm Imani Gandy.

Jessica Pieklo:

And now We'll Hear Arguments.

[title montage]

Jessica Pieklo:

One of the central criticisms anti-choice activists make of Roe v. Wade is that it is an illegitimate decision, because nowhere in the Constitution does the word "abortion" or "privacy" show up.

Imani Gandy:

Yeah, well nowhere in the Constitution does it say that corporations are people either. Or, that I have a Constitutional right to own a bazooka. So, how about they get over it, huh?

Jessica Pieklo:

I mean, on the one hand though, Imani, they're right. The Constitution doesn't say privacy. It doesn't say contraception or abortion. So, I guess if the extent of your constitutional analysis is basically a CTRL+F word search to argue against privacy rights, then hey, congratulations. You're likely qualified to be a federal judge according to the Trump Administration standards.

Jessica Pieklo:

Because the thing is, the Constitution doesn't include a lot of words that matter when flushing out our constitutional rights. So what? Because it does contain one super important amendment that can

conservatives conveniently ignore when claiming there's no constitutional basis for a right to an abortion.

Imani Gandy:

And that's the Ninth Amendment.

Imani Gandy:

The Ninth Amendment is a really important part of the Bill of Rights, and it says basically all the rights not listed in the Constitution belong to the people, not to the government. So in other words, the rights of the people are not limited to just the rights listed in the Constitution. Don't see the word "privacy"? It doesn't matter. The Constitution still protects it.

Jessica Pieklo:

Hogwash.

Imani Gandy:

Excuse me?

Jessica Pieklo:

Hogwash.

Imani Gandy:

What do you mean, "hogwash"?

Jessica Pieklo:

I'm sorry, Imani. We're what, almost 50 years out from the Supreme Court deciding Roe v. Wade, and conservatives insisting there is no constitutional basis for a right to an abortion. You're trying to tell our listeners it's as simple as the Ninth Amendment? Sorry, that just can't be right.

Imani Gandy:

But it is. Look, don't take my word for it. Here's what it says:

Imani Gandy:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage other rights retained by the people."

Jessica Pieklo:

Okay, and what else?

Imani Gandy:

That's it. That's all it says. And translated out of law speak, it's even more straightforward. Simply put, just because the Constitution enumerates or spells out some rights specifically doesn't mean it does so at the exclusion of others.

Jessica Pieklo:

Suck on that originalists. There is a case to be made that the Constitution does inherently recognize abortion rights, and it's called the Ninth Amendment!

Imani Gandy:

Absolutely. The Ninth Amendment was ratified with the original Bill of Rights in 1791, and James Madison, who was the founding father most jazzed about the Ninth Amendment, wanted to include it as a safeguard to make it clear that just because the Bill of Rights talks about other rights specifically, like the right to free speech, and the right to practice religion, doesn't mean those were the only rights the Constitution protected.

Jessica Pieklo:

So you're telling me that the Ninth Amendment is literally the framer's way of making sure the government doesn't try to limit individual rights and liberties?

Imani Gandy:

I certainly am. And, it's also exactly what Weddington told the Justices again during the second round of arguments in Roe. Listen to Weddington make a very specific case for where in the Constitution a right to an abortion can be found.

Sarah Weddington:

In our original brief, we alleged a number of constitutional grounds. The main one that we are relying on before this court are the Fifth, the Ninth, and the 14th Amendments. There's a great body of precedent. Certainly, we cannot say that there isn't a Constitution so stated, the right to an abortion. But neither is there stated the right to travel, or some of the other very basic rights that this court have held are under the United States Constitution.

The court has in the past, for example, held that it is the right of the parents and of the individual to determine whether or not they will send their child to private school, whether or not their children will be taught foreign languages, whether or not they will offspring: the Skinner case, whether the right to determine for themselves whom they will marry: the Loving case, and even in Body v. Connecticut, the choice, saying that marriage itself is so important that the state cannot interfere with termination of a marriage just because the woman is unable to pay the cost.

Griswold, of course, is the primary case holding that the state could not interfere in the question of whether or not a married couple would use birth control. Since then, this court of course, has held that the individual has the right to determine whether they are married or single, whether they will use birth control.

There is a great body of cases decided in the past by this court in the areas of marriage, sex, contraception, appropriation, childbearing, and education of children, which says that there are certain things that are so much a part of the individual concern that they should be left to the determination of the individual.

Imani Gandy:

Listen to all of those rights: the right to travel, the right to parent your children. So many rights!

Jessica Pieklo:

I think it's really effective for Weddington to play sexual privacy at the end of this list of already widely accepted other un-enumerated rights. She very plainly leads the Justices down her constitutional path. Of course, the Ninth Amendment recognizes a right to an abortion is kind of the only conclusion you can come to by the time Weddington is done.

Imani Gandy:

So, Weddington makes a pretty straightforward case that the Constitution recognizes abortion rights even if the word "abortion" doesn't appear in the Constitution.

Jessica Pieklo:

Yep!

Imani Gandy:

So what's Texas's response? It seems like Weddington has a pretty open and shut case here.

Jessica Pieklo:

Texas's response is what I'd call a "constitutional bob and weave."

Imani Gandy:

Excuse me, a constitutional bob and what now?

Jessica Pieklo:

A bob and weave. You know, Imani, what boxers do when they jab really fast at their opponent while moving their head side to side? A bob and weave. On the question of whether or not there's a right to privacy that included a right to an abortion, Texas weaved. The attorneys for the state played more defense on that point than they did make the affirmative constitutional case against an individual right to abortion.

Jessica Pieklo:

Listen to Jay Floyd stroll all over the Constitution when addressing Sarah Weddington's privacy arguments with the Justices.

Jay Floyd:

When does the soul come into the unborn - if a person believes in the soul, I don't know. I assume the appellants now are operating under the Ninth Amendment rights. There are allegations of First Amendment rights being violated. However, I feel there is no merit. This statute does not establish any religion; nor does it prohibit anyone from practicing of any part of any religious group. I see no merit in their contentions that it could possibly be under freedom of speech or press.

Imani Gandy:

Hold up. Hold up. Did Jay Floyd just bring up the First Amendment? What on earth is he even talking about?

Jessica Pieklo:

Free speech rights in an abortion ban? I'm as confused as Jay Floyd sounds. I wonder if it gets any better if we keep the clip playing.

Imani Gandy:

Probably not, but let's give a whirl.

Jay Floyd:

The other constitutional rights that the appellant speaks of, I think, are expressed in two manners: The individual, or marital right of privacy; and, secondly - or -- or the right to choose whether or not to abort a child. Now, if those are out of the case, the marital privacy is out of the case. But be that as it may, neither individual nor marital privacy has been held to be absolute.

Imani Gandy:

Okay, so Floyd kind of sort of pulls it together there, so I stand corrected. At least we're not talking about the press anymore, and we're back to sexual privacy rights.

Jessica Pieklo:

Okay, fine. Nancy Pelosi applause to Jay Floyd here for conceding their privacy rights. He has to. There's an entire body of case law based on the Bill of Rights establishing them! But while he's conceding the right to privacy, he's also searching around for ways to get the Justices to limit it. That's a weave. The bob, the part of their argument when Texas goes on the constitutional offense rather than playing defense, that's fetal personhood.

Imani Gandy:

Texas's argument that life begins at conception, and that fetus is a person under the 14th Amendment is it's way of jabbing back at a pretty straightforward constitutional right to privacy argument, because if a fetus is a person with rights, that would require legislatures and courts to balance the rights of those two "people".

Imani Gandy:

Here's Justices Blackmun and White debating that very point with Sarah Weddington.

Justice Blackmun:

What do I get from this then, that your case depends primarily on the proposition that the fetus has no constitutional rights.

Sarah Weddington:

It depends on if the woman has a fundamental constitutional right, and that the state has not proved any compelling interest for regulation in the area. Even if the court at some point determined the fetus to be entitled to constitutional protection, you would still get back into the weighing of one life against another.

Jessica Pieklo:

Okay, sorry to interrupt, but I just got to say I love how Weddington pulls Blackmun right back to her backup argument. It's such a contrast to Floyd, who's like the droopy dog of Supreme Court litigators.

Imani Gandy:

But Weddington is even better than that. Because that weighing of lives argument is a dicey one for her to make, she knows there are pitfalls for her case in that argument, and she's got her rebuttals to those weaknesses ready. Here's the rest of that exchange.

Justice White:

And that's what's involved in this case? Weighing one life against another?

Sarah Weddington:

No, Your Honor. I said that would be what would be involved if the facts were different and the state could prove that there was a person with a constitutional right.

Justice White:

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?

Jessica Pieklo:

Oh, this is getting testy as far as these arguments go.

Imani Gandy:

Yeah, but Weddington totally has this handled. Listen to how she manages Justice White here.

Justice White:

Do you have any weight on who you're going to be balancing the rights of the mother against the rights of the fetus?

Sarah Weddington:

It seems to me that you do not balance the constitutional rights of one person against mere statutory rights of another.

Justice White:

Do you think a state interest, if it's only a statutory and prehistoric constitutional interest under the state law, can never outweigh a federal constitutional right?

Sarah Weddington:

It would seem to me that-

Justice White:

So all the talk of compelling state interest is beside your point. It could never be compelling enough.

Jessica Pieklo:

She is just so good. Truly, she is.

Imani Gandy:

Okay, so we've talked about Weddington having a backup argument in case the court was leaning toward finding a fetus a person under the Constitution. But Texas had a backup argument in case the Justices seemed skeptical of it's claim that a fetus was a person.

Jessica Pieklo:

Oh, yeah? I bet this is going to be good.

Imani Gandy:

If by "good" you mean bonkers, then yes, it's going to be good.

Imani Gandy:

The attorneys for Texas know they'd likely lose their case if the court doesn't accept the argument that states have an interest in protecting fetal life. So, like Weddington, Texas has a backup argument, and it's a doozy.

Imani Gandy:

Here's Robert Flowers during the second oral argument claiming that the state also has an interest in preventing promiscuity, and that's enough to justify it's abortion ban.

Jessica Pieklo:

What?

Imani Gandy:

Yeah, you heard me. The state apparently thinks it has an interest in ensuring that Texas women remain chased.

Justice White:

Well then you've lost your case then if the fetus or embryo is a not a person, is that it?

Robert Flowers:

Yes, sir. I would say so.

Justice White:

You mean the state has no interest of it's own that it can assert in the-

Robert Flowers:

Oh, we have other interests, Your Honor, preventing promiscuity, say.

Justice White:

Maybe that's an interest.

Jessica Pieklo:

Maybe that's an interest? How are these guys just so casual about all these arguments?

Imani Gandy:

It's truly stunning, just like it's stunning how Justice White once again spoon feeds Texas it's own arguments. Here's the rest of that clip.

Justice White:

You're asserting that your state law wants to protect the life of the fetus.

Robert Flowers:

Yes, sir.

Justice White:

And under state law there is some rights given to the fetus.

Robert Flowers:

Yes, Your Honor.

Justice White:

And you are asserting those rights against the right of the mother.

Robert Flowers:

Balancing against the Ninth Amendment rights or-

Justice White:

Yes.. But that's only aside from whether or not the fetus is a person under the federal Constitution. You can still assert those rights whether the fetus is a person or not.

Robert Flowers:

Yes, Your Honor.

Imani Gandy:

I mean, this sounds like Justice White is deposing Flowers as if Flowers is a witness the lawsuit rather than the attorney arguing his case before Justice White and the rest of the Supreme Court Justices.

Jessica Pieklo:

Ultimately in the Roe decision, the court basically said, "Are you kidding me?" To the claim that Texas had an interest in curbing promiscuity. You can hear Justice White steering Flowers away from saying anything else utterly ridiculous about how the state should be involved in private consensual sex.

Imani Gandy:

Then again, given the times it wasn't such a wild argument to make. Remember that at the time, plenty of states were regulating sex between consenting adults in the privacy of their own homes.

Jessica Pieklo:

Are you talking about Bowers v. Hardwick and Lawrence v. Texas, and the criminalization of sodomy?

Imani Gandy:

You're goddamn right I am. I mean, it's a bit off topic, but it is pertinent in order to understand just how up in people's sexual business states thought that they had a right to be.

Jessica Pieklo:

Oh, okay. So, say more about this.

Imani Gandy:

Right.

Imani Gandy:

In 2003, that's less than 20 years ago, the Supreme Court decided a case called Lawrence v. Texas. Texas had a statute that prohibited sexual conduct between two persons of the same sex. The court ruled in Lawrence that the statute was an unconstitutional violation of the Due Process Clause guarantees of liberty and privacy.

Imani Gandy:

Lawrence v. Texas overruled a 1986 case called Bowers v. Hardwick. Lawrence overruled those laws and similar laws in several states.

Jessica Pieklo:

That was a very good decision. But make no mistake about it, the fact that those laws ever existed in the first place shows the government has always tried to get inside your bedroom.

Imani Gandy:

Let's get back to Flowers and his woeful unpreparedness. Here's an interesting tidbit, according to David Garrow in his book, "Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade," Flowers admitted that he was unprepared! He even admitted that he had not made notes about what to cover during the argument, which is absolutely astonishing considering Weddington's level of preparation.

How are you going to roll up to the Supreme Court with nary a note and think you're going to be able to successfully argue a case before the highest court in the land? Hell, if you're an attorney going to make

an argument challenging a parking ticket in state municipal court, you jot some notes down. I mean, this is absurd.

Jessica Pieklo:

It is absolutely absurd, but I'm also kind of hung up on this idea that pregnancy is punishment for having sex and that the Constitution would be okay with that.

Imani Gandy:

Oh, but wait though. It's even worse than that. Listen to this exchange between Justice White and Jay Floyd.

Justice White:

What procedure would you suggest for any pregnant female in the state of Texas ever to get any judicial consideration of this constitutional claim?

Jay Floyd:

Your Honor, let me answer your question with a statement, if I may.

Justice White:

Okay.

Jay Floyd:

I do not believe it can be done. There are situations in which, of course as the Court knows, no remedy is provided. I think she makes her choice prior to the time she becomes pregnant. That is the time of the choice.

Imani Gandy:

Excuse me, what now?

Jay Floyd:

It's like more or less the first three or four years of our life we don't remember anything. But once the child is born, the woman no longer has the choice. I think pregnancy may terminate that choice.

Justice White:

Maybe she makes the choice when she decides to live in Texas.

Jay Floyd:

May I proceed?

Justice White:

There's no restriction on moving.

Jessica Pieklo:

This is the kind of back and forth that makes me want to go burn something down. She makes her choice before she gets pregnant? There is no restriction on moving? Can we pause for one blessed minute on the fact that Floyd tosses out, "She can move," in response to the state restricting a fundamental right when, wait for it, the right to travel is a fundamental right protected by the Ninth Amendment just like the right to abortion.

Imani Gandy:

But let's get back to this balancing act that the court is considering. Any way you slice it, it is utterly preposterous to balance the rights of a living, breathing person against the life of a nonperson. Remember, a fetus is not a person. It's a corporation.

Jessica Pieklo:

Now ultimately, the court in Roe would rule that during the first trimester, the pregnant person's privacy rights outweigh all state interests, thus granting an unfettered right to choose an abortion. After the first trimester, those states interests in protecting the health of the pregnant person permits them to establish standards for how abortions will be performed.

Jessica Pieklo:

After fetal viability, the state's interest outweighs the pregnant person's privacy interests, permitting the state to ban abortion entirely.

Imani Gandy:

That's because the later along a pregnancy is, the more a person the developing pregnancy becomes.

Jessica Pieklo:

So, if the state's interest in potential fetal life is balanced against the pregnant person's right to reproductive autonomy, and the state's interest comes out on top, this necessarily leads to the criminalization and punishment of the pregnant person.

Imani Gandy:

Remember this gem from Justice White that we played at the beginning?

Justice White:

Who would you choose to kill? The innocent one or what?

Jessica Pieklo:

That's never not going to hurt my ears. One gets the feeling that White might approve of killing the sinner to save the innocent. Sadly for him, the sinner is necessary to maintain the life of the innocent, or at least anti-choicers are able to grow babies in pods or something like in the Matrix.

Imani Gandy:

Hey man, artificial wombs are a thing. They're already growing sheep in them. Bring on the artificial wombs. That's what I say. And keep the goddamn government out of mine.

Imani Gandy:

White's comments are illustrative and dangerous. By castigating the pregnant person seeking an abortion as not innocent, it makes it easier to discount that person's life in favor of the fetal life developing in that person's womb.

Jessica Pieklo:

Justice Marshall picks up on this issue as well. In this amazing exchange with Robert Flowers, he makes the point that the state of Texas can't just decide which lives it wants to protect.

Justice Marshall:

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

Robert Flowers:

I'm sorry. I didn't understand you correctly.

Justice Marshall:

Could Texas say if it comes a situation for the benefit of the health of the wife, that the husband has to die, could we kill him?

Robert Flowers:

I wouldn't think so, sir.

Justice Marshall:

Makes sense.

Robert Flowers:

I wouldn't think so.

Imani Gandy:

Can I just say that I absolutely love this exchange. It's devastating. Justice Marshall straight up calls bullshit, and Flowers can't do anything about it but sit there and take it.

Jessica Pieklo:

And that's because Justice Marshall is absolutely correct. It's absurd to compare a fetus to a born person for purposes of balancing rights like Texas suggests.

Imani Gandy:

So Jess, here we are yet again having bombarded our listeners with a ton of information. Let's recap what we've just discussed.

Jessica Pieklo:

We talked a lot about rights: the rights of a pregnant of a person and the rights of a fetus. We heard a lot of arguments about how to balance those rights.

Imani Gandy:

We also talked about the Ninth Amendment, which is a super underrated amendment that doesn't get a whole lot of shine. If jazz hands were a thing back in 1770-whatever, then the framers would have been very jazz handsy about the Ninth Amendment. James Madison in particular, he might have even elevated to spirit fingers.

Imani Gandy:

The Ninth Amendment is the one that says, "Hey man, just because we enumerated a bunch of rights in the Bill of Rights, that doesn't mean that there aren't other un-enumerated rights that are held by the people and protected by the Constitution."

Jessica Pieklo:

In her argument, Sarah Weddington said that the right to an abortion is one of those unenumerated rights.

Imani Gandy:

We cringed at Justice White's denunciation of pregnant people as "not innocent", when he asked that horrible question about whether to kill the innocent one.

Jessica Pieklo:

Perhaps most importantly of all, we talked about how utterly preposterous it is to balance the fundamental rights of an alive, breathing pregnant person against the judicially created rights of a fetus.

Imani Gandy:

It's especially preposterous considering that Texas couldn't even prove why lawmakers passed their abortion ban to begin with. All of that talk about balancing rights depends on a legitimate state interest to do so. Justice Stewart cuts right to the chase on this issue. Here he is with Sarah Weddington in 1971.

Justice Stewart:

What is the assertive state interest at least? Is there any legislative history about this statute?

Sarah Weddington:

No, sir, Your Honor. No, sir there is not.

Imani Gandy:

That's what we're going to talk about in our next episode: state interest, specifically the state's interest in regulating or banning abortion.

Jessica Pieklo:

We'll dive into the debate between Sarah Weddington and the Texas attorneys over how much power states should have to restrict abortion rights. And more importantly, where the hell does that power even come from?

Imani Gandy:

We'll explain that if states are going to restrict fundamental rights, they need a damn good reason to do so.

Jessica Pieklo:

We'll Hear Arguments as created by Jessica Mason Pieklo, Imani Gandy, and Marc Faletti.

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We'll Hear Arguments was recorded at Side Three 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:

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