

[We'll Hear Arguments podcast — The State's \(Creeping\) Interest: Roe v. Wade, Episode 3](#)

Jessica Pieklo:

Maybe a fetus is a person. Maybe it isn't.

Imani Gandy:

It isn't.

Jessica Pieklo:

I know, I know. But that was a massive debate during the arguments for Roe v Wade, which we covered in episode one.

Imani Gandy:

So, was the question of whether and how to balance the rights of the fetus against the rights of the pregnant person.

Jessica Pieklo:

We covered that in episode two and again it feels pretty clear who should win that argument and it's got nothing to do with quote, unquote innocence.

Imani Gandy:

But there's a third player in this case, Jess.

Jessica Pieklo:

Imani, this is a family program. We are not talking about threesomes. [laughter]

Imani Gandy:

No, no! I'm talking about the state. As in the state of Texas, AKA the government. They're the ones who passed this abortion ban.

Jessica Pieklo:

Okay, well then Imani, I have a pretty simple question for you.

Imani Gandy:

Oh boy.

Jessica Pieklo:

What gives them the right to even pass that man in the first place?

Imani Gandy:

Sarah Weddington wondered the exact same thing.

Sarah Weddington:

The state has alleged, and its only alleged interest in this statute, is the interest in protecting the life of the unborn. However, the state has not been able to point to any authority of any nature whatsoever that would demonstrate that this statute was in fact adopted for that purpose.

Jessica Pieklo:

And that's why for our third episode, we need to focus on this question. Where does the state's power to regulate abortion come from and how much of that power does it have?

Imani Gandy:

I'm Imani Gandy.

Jessica Pieklo:

I'm Jessica Mason, Pieklo.

Imani Gandy:

And now we'll hear arguments.

[title montage]

Jessica Pieklo:

So, everyone pretty much accepts as true today that states have a legitimate interest in doing that balancing test vis-à-vis abortion restrictions. But when Roe was argued, that wasn't a given, Imani. The court had never actually answered this question of what power states have to restrict abortion and where that power comes from. Listen to this exchange between Justice Marshall and Jay Floyd. Now keep in mind that Floyd's job is to convince the Justices that Texas knew what it was doing when it passed its abortion ban.

Imani Gandy:

He's going to reference a case, Thompson v State, that was decided a month before the Roe arguments. Thompson v State upheld the conviction of a doctor for performing an abortion in Texas.

Justice Marshall:

What is Texas' interest in this fashion?

Jay Floyd:

Mr. Justice , the Thompson case, which has been cited to the Court -- Thompson v. State -- the Court of Criminal Appeals did not decide the issue of privacy. It was not before the court; or, the right of choice issue. The State Court, Court of Criminal Appeals, held that the State had a compelling interest because of the protection of fetal life. They recognized the humanness of the embryo, or the fetus, and they said, we have an interest in protecting fetal life. Whether or not that was the original intent of the statute, I have no idea.

Imani Gandy:

You know, Jess, I have to say, one of the things that amazes me the most about these oral arguments is the number of times attorneys for the state of Texas answered a question from one of the Justices with the equivalent of, "Eh. Beats me."

Jessica Pieklo:

I know, right? Especially on such an important point, like "Do you have the power to do this thing you are trying to do?" It's a central issue of the case. So, let's break this down.

Jessica Pieklo:

Governments pass laws to address matters of public concern. Think of matters of public concern as anything having to do with running a community. Traffic laws are matters of public concern. Regulating businesses to make sure people don't get ripped off. That's a public concern. You get the idea.

Imani Gandy:

And sometimes those laws impact individual constitutional rights, and when that happens it's the court's role to figure out if the government went too far in trying to address that public concern.

Jessica Pieklo:

In any constitutional fight, the government, in this case, the state of Texas has to be able to do two things. First, it has to be able to identify that matter of public concern it's wading into.

Imani Gandy:

Generally speaking, that's called the government interest, which here Floyd says is protecting fetal life.

Jessica Pieklo:

And once it's identified that matter of public concern, it has to be able to make its case that the proposed law addresses that public concern. Usually that's done in the legislative history of a particular statute. Which again, here, Floyd said he had no clue what the state was thinking when it tried to criminalize abortion.

Imani Gandy:

So, when it comes to abortion rights, we're talking about three competing sets of constitutional considerations. The rights of the pregnant person, the potential rights of the fetus, and the power of the state to balance those rights against each other. And that means that Texas had to prove the state had some legitimate interest in banning or restricting abortion to begin with.

Imani Gandy:

Normally states make the showing that they are addressing a matter of public concern in the legislative history of a statute that they're passing. Now, that's the place in the statute where law makers explain their thinking. Where they show their constitutional work, so to speak, and justify the law that they are enacting.

Jessica Pieklo:

But the Texas statute had no legislative history, so there's nothing the attorneys could point to and say, "See, here's what lawmakers were thinking and why it's legit." And that means the court and the attorneys were left guessing about the motives of lawmakers who passed the Texas abortion ban.

Imani Gandy:

Of course, one of the problems with guessing about lawmaker motives is that it's just that: A guess., Justice Stewart hones in on this problem with Floyd just after Floyd asserts Texas has an interest in protecting fetal life in abortion ban.

Justice Stewart:

And yet Texas does not attempt to punish a woman who herself performs an abortion on herself.

Jay Floyd:

That is correct, your honor, and the matter has been brought to my attention. Why not punish for murder, since you are destroying what you - or what has been said to be a human being? I do not know, except that I will say this. As medical science progresses, maybe the law will progress along with it. Maybe at one time it could be possible, I suppose, statutes could be passed. Whether or not that would be constitutional or not, I don't know.

Jessica Pieklo:

So Imani, I have a question. Does Jay Floyd know anything? Because seriously, all he seems to do is tell the Justices that he doesn't have a clue what's constitutional and what's not when it comes to abortion.

Imani Gandy:

I don't know. Maybe he's trying to be deferential to the Justices and not look like a know it all? I suppose waltzing up to the podium and declaring that Jay Floyd and the state of Texas know with certainty when life begins could come off a little aggressive.

Jessica Pieklo:

But the reality is lawyers have to be able to take their arguments to their logical conclusion and for Floyd, the logical conclusion of asserting that the state can ban abortion to protect fetal life is that if a pregnant person has an abortion, the law would consider that murder.

Imani Gandy:

And Justice Stewart's point here is really effective. It lays bare the weakness of Texas's claim.

Imani Gandy:

If the state of Texas was going to claim it was restricting abortion rights to advance its interest in protecting fetal health, then how come the state hasn't tried to punish people who terminate their own pregnancies?

Jessica Pieklo:

And I suppose statutes could be passed, Floyd says. Well, Imani, he supposes right. That's the battle being fought in courts right now.

Jessica Pieklo:

In an effort to show the court that they are really serious about their interest in fetal life, anti-choice advocates have moved away from shielding pregnant people. In fact, now they're basically advocating for punishing them. That's probably because they recognize that picking and choosing who could be punished for murder doesn't exactly bolster their case that a state interest in fetal life is compelling.

Jessica Pieklo:

Let's go back to Stewart and Floyd in 1971 again. Stewart makes a key point here. No state at the time equated abortion with murder.

Justice Stewart:

There's no state, is there, that equates abortion with murder. Or is there?

Jay Floyd:

There is none, Your Honor, except one of our statutes that if the mother dies, that the doctor shall be guilty of murder.

Justice Stewart:

But that's ordinary.

Jay Floyd:

Yes.

Justice Stewart:

Felony murder.

Jay Floyd:

I would say so, Mr. Justice , yes.

Imani Gandy:

And this is a total disconnect. The state of Texas was trying to claim an interest in protecting fetal life to defend the abortion ban, right? But Texas couldn't point to anywhere in the statute where law makers actually tied the abortion ban to an interest in fetal life. Sarah Weddington pounced on this disconnect during the second round of arguments

Sarah Weddington:

The state has alleged, and its only alleged interest in this statute, is the interest in protecting the life of the unborn. However, the state has not been able to point to any authority of any nature whatsoever that would demonstrate that this statute was in fact adopted for that purpose.

Sarah Weddington:

We have some indication that other state statutes were adopted for the purpose of protecting the health of the woman. We have an 1880 case in Texas, shortly after the 1854 statute was adopted, that States that the woman is the victim of the crime and is the only victim the court talks about. We have all

the contradictions and the statute and the way so many things that just don't make sense. If the statute was adopted for that purpose. For example, why is the woman guilty of no crime? If the statute was adopted for that purpose, why is it that the penalty for abortion is determined by whether or not you have the woman's consent?

Jessica Pieklo:

So, this point Weddington makes is a good one. Although I wish she hadn't made it and that's because some states are starting to make noise about wanting to charge pregnant people with crimes for getting abortions.

Imani Gandy:

You mean like Ohio has done by introducing a bill that would add the crimes of, wait for it, abortion, murder and aggravated abortion murder, to the Ohio criminal code? The legislation would imprison or execute, depending on the circumstances, pregnant people who get abortions. Jess, it is nonsense.

Jessica Pieklo:

It is. But back when Roe v Wade was argued, Texas couldn't show that they were serious about their state interest in fetal life because they punished only doctors. How could the state say it had an interest in protecting fetal life if it wasn't protecting all fetal life by punishing not just doctors who performed abortions, but the people who had them as well?

Imani Gandy:

While Stewart was concerned about the power of the state to outlaw abortion and was looking for some limiting principle to reign that state power in, Justice Byron White was concerned that declaring abortion a fundamental right could lead to, "abortion on demand." Check out this exchange between Sarah Weddington and Justice White where Justice White is trying to find some way to limit a ruling that abortion is a fundamental right.

Sarah Weddington:

It is our position that the freedom involved is that of a woman to determine whether or not to continue a pregnancy. Obviously I have a much more difficult time saying that the state has no interest in late pregnancy.

Justice White:

Why? Why is that?

Sarah Weddington:

I think it's more of the emotional response to a late pregnancy rather than it is any constitutional.

Justice White:

Emotional response by whom?

Sarah Weddington:

I guess by personally considering the issue outside the legal context. I think as far as the state-

Justice White:

Well, do you or don't you say that the constitutional right to insist reaches up from the time of birth ...

Sarah Weddington:

The constitution, as I read it and as interrupted and documented by Professor Means, attaches protection to the person at the time of birth. Those persons born are citizens.

Jessica Pieklo:

Okay. There's a lot happening here.

Imani Gandy:

First is another reminder by Sarah Weddington that constitutional rights attach at birth. Jess, I just feel like it's never a bad thing to remind folks that rights attach at birth.

Jessica Pieklo:

Second is the conversation around later abortion and boy howdy is it a doozy. Weddington makes a huge concession here when she says that she'd have a more difficult time saying the state has no interest in later pregnancy and it's one that would be used against her when the Justices decided the case.

Jessica Pieklo:

This concession helps set up the trimester framework from the Roe decision. That's what the court said that states have more power to restrict abortion and in some cases ban it all together later in pregnancy.

Imani Gandy:

Essentially she's saying that states may have more of an interest in regulating abortion as the pregnancy progresses and the court ultimately incorporated that into its decision.

Imani Gandy:

The court ruled that the state has a compelling interest in regulating abortion after the first trimester and can ban it entirely, if they want to, during the third trimester. I feel like this is another example of Weddington making a concession that in hindsight we can be critical of now, almost 50 years later. Because after all hindsight is 2020.

Imani Gandy:

But at the time the case was argued this was actually a good strategic decision.

Jessica Pieklo:

Oh no, no, no. We are not going to talk about how a fetus is a corporation again, Imani, are we?

Imani Gandy:

I mean we could. Because I loved that conversation quite frankly. But really I think this concession is another example of Weddington being a boss bitch, right? Just being able to offer the Justices a couple of different paths to rule in her favor.

Jessica Pieklo:

Ooh, I like where this is going. Say more.

Imani Gandy:

Say more about Weddington being a boss bitch?

Jessica Pieklo:

Definitely.

Imani Gandy:

Gladly. So, for Weddington, the best case scenario from the court would be a ruling fully supporting abortion rights as a fundamental right that leaves the state with little or no power to restrict those rights.

Jessica Pieklo:

That would be amazing.

Imani Gandy:

But given the makeup of the court, probably not going to happen. Just like today, the Justices who heard Roe v Wade were a mixed bag of ideologies. Some like Justice Stewart and Justice Marshall were more liberal. Others like Justice White were as conservative as folks like Justice Clarence Thomas and Sam Alito today.

Jessica Pieklo:

Imani, can you imagine arguing Roe v Wade before Justice Thomas though?

Imani Gandy:

I would be willing to bet money on there being some kind of anti-choice fanfic out there that re-imagines the row arguments with only conservative Justice s. Something like 50 Shades of Conservative Justice s.

Jessica Pieklo:

Behind the Robe.

Imani Gandy:

Behind the Robe. But seriously though, Weddington knows the chances of getting the decision that she wants are slim to none. And as my dad would say, slim just left town. And she also knows that she's not going to win any wavering Justices over to her side by coming across as arrogant and unreasonable.

Jessica Pieklo:

So, she doesn't.

Imani Gandy:

It's a gamble, but it's one that I think ultimately pays off for Weddington and abortion rights generally because the majority of Justices would ultimately agree with Weddington's main argument that abortion is a fundamental right.

Jessica Pieklo:

Let's get back to this exchange though, because really the meat of it is Justice White searching for some source of power for the state of Texas here. White knows that if the court declares abortion a fundamental right and finds that a fetus isn't a person under the constitution, that Texas loses. And it's not just that Texas loses.

Jessica Pieklo:

From Justice White's perspective, he's trying to avoid the court creating legal doctrine that makes it difficult for states to restrict abortion because he's super anti-abortion.

Imani Gandy:

We should explain why Texas would lose, because that's actually really important. Also because I just really want to talk about levels of judicial scrutiny. If abortion is a fundamental right, that means that any laws burdening that right would be subject to strict scrutiny.

Jessica Pieklo:

Imani, I love it when you talk about levels of constitutional scrutiny.

Imani Gandy:

Jess, I love it too. So, let's get sexy with it. All right. We often think of strict scrutiny as being applicable to discrimination on the basis of race or other immutable characteristics. But strict scrutiny applies in other areas as well. When it comes to fundamental rights like your first amendment right to free speech, the courts will use strict scrutiny in determining whether or not a law infringing on those rights is constitutional.

Imani Gandy:

To surpass strict scrutiny, the law must promote a compelling government interest and be narrowly tailored to achieve that compelling government interest. Essentially, strict scrutiny is the toughest look that a court can give a law.

Jessica Pieklo:

Basically the government is going to lose on a strict scrutiny analysis unless the law restricting a fundamental right is super precise in how it's regulating that right.

Imani Gandy:

Exactly. If a state law is being subject to strict scrutiny, the state has already probably lost. That's because they need a compelling interest, in other words, a damn good reason, and the state must demonstrate that the law will actually achieve that interest and that the law is written with laser-like

precision to achieve that interest while placing as few restrictions on the fundamental right as possible. That's a really hard standard to meet and it would have been impossible for Texas to meet.

Jessica Pieklo:

That's because Texas would have to offer evidence to the court that lawmakers, for example, were specifically trying to advance an interest in fetal life when they pass Texas's abortion ban. And remember Texas didn't have any of that evidence.

Jessica Pieklo:

It wasn't in the legislative history and other cases and statutes didn't talk about the state interest at all. If abortion is not a fundamental right, then laws restricting abortion would be subject to rational basis review. This means that the law must be rationally related to a legitimate state interest. It's basically the judicial equivalent of, "Meh, whatever." Do what you want as long as there's some reason for it. It's an easy standard to surpass and Texas would have had no problem. That's what Texas wanted and that's what Justice White wanted.

Imani Gandy:

Let's get back to White and how he's trying to help Texas because Texas doesn't seem to be able to help itself. Remember this back and forth White has with Flowers in 1972 from our last episode? White is practically arguing Flowers' case for him, dangling state interests before Flowers in the hopes that he'll pick up on them. White is feeding Flowers arguments that will enable Texas to win even if a fetus isn't a person. Listen to it again.

Justice White:

I think the case is over for you. You lost your case then, if the fetus or the embryo is not a person. Is that it?

Robert Flowers:

Yes, sir. I would say so.

Justice White:

You mean the state has no interest of its own that it can assert?

Robert Flowers:

Oh we have other interest, your honor. Preventing promiscuity, maybe that's--

Justice White:

... Your legislature apparently, or, 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 are some rights given to the fetus and you are asserting those rights against the right of the mother.

Robert Flowers:

Balancing against the ninth amendment rights-

Justice White:

Yeah, but that's wholly 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, sir.

Imani Gandy:

It's kind of amazing how White saves Flowers' ass here.

Jessica Pieklo:

Frankly, it's wild to me how much work Flowers makes the Justices do for his case. Do you think he just walked in the court like, "No big deal. Going to debate this lady then get a whiskey." Because that's how he comes off.

Imani Gandy:

I mean basically. We talked about it in the last episode, right? How he admitted he wasn't prepared and didn't write down a single goddamn note. I bet that White had a good sense that there weren't enough votes on the court to find a fetus as a person under the constitution and so he's going to shore up what he can doctrinally for the anti-choice movement.

Jessica Pieklo:

So, basically Justice White is arguing on behalf of the state of Texas. That's cool and not at all upsetting.

Imani Gandy:

He's saving Flowers' ass so much here that when Flowers goes to the constitutional balancing argument, White brings him back out of it.

Jessica Pieklo:

It's as if White can see the constitutional paths the opinion is going to take and is doing everything he can to drive Flowers back onto the right one and Flowers is still kind of dopey about it.

Imani Gandy:

He really, really is.

Jessica Pieklo:

So, the state has an interest in fetal life and if that interest doesn't work out constitutionally speaking, because a fetus isn't a person and all, they move right onto the state interest in preventing promiscuity.

Imani Gandy:

As we discussed last episode, that's bananas. What's the definition of promiscuity anyway? Getting pregnant out of wedlock? Christ almighty.

Jessica Pieklo:

Constitutionally speaking, Imani, that might be the argument that flowers was trying to make.

Imani Gandy:

What are you even talking about, Jess?

Jessica Pieklo:

Okay, so Roe is an abortion rates case, right? But it's also a privacy case, specifically a sexual privacy case.

Imani Gandy:

Ooh, okay. I see where this is going.

Jessica Pieklo:

Without going into the entire case right now because we're going to save that for another season of We'll Hear Arguments. In Griswold v Connecticut, the Supreme Court ruled that the right to privacy includes the right of married couples to use contraception.

Jessica Pieklo:

Griswold is a foundational case when it comes to privacy rights. The court decided that case in 1965 but it wouldn't be until 1971, six years later, in Eisenstadt v Baird that the court would rule that single people also had a constitutional right to privacy that includes the right to access and use birth control.

Imani Gandy:

Six years later. For six years, married people could theoretically legally use contraception, no big deal, but single people could not. Let's just sit with that for a second because it is absurd. In the contraception cases, states defended their restrictions in part by asserting a state interest in preventing promiscuity.

Jessica Pieklo:

Now, look, we've given flowers a lot of grief so far because frankly it doesn't seem like he was doing a very good job at oral arguments.

Imani Gandy:

He wasn't.

Jessica Pieklo:

But he's not a total jackass. He knows Griswold and he knows Eisenstadt. He knows there's precedent for the court slow walking expansions of reproductive rights. If the court is going to find the right to abortion exists, maybe he can get them to limit that ruling only to married people.

Jessica Pieklo:

And a state interest in preventing promiscuity? That just might get the Justices there! I know, sorry. I get excited when these pieces come together. Sorry.

Imani Gandy:

But you're exactly right though. When Roe was argued, the court hadn't said what the state interest in abortion was yet. So, why not offer up a couple of familiar scenarios? Because Supreme Court Justices like nothing more than something familiar when it comes to deciding big constitutional issues.

Jessica Pieklo:

Hold on. So, that means it's the court could have decided that only married people had the right to abortion?

Imani Gandy:

Yeah. The court didn't, thankfully, and that's another testament to Sarah Weddington being a boss bitch and doing a damn good job at oral arguments. But Flowers didn't just pick preventing promiscuity out of thin air. There was a constitutional reason for it.

Jessica Pieklo:

Sorry, I'm still here thinking about a row argument with Justice Thomas on the bench and the court issuing a decision recognizing the right to abortion only for married couples. What?

Imani Gandy:

Honestly Jess, just give conservatives a year or two. That might be a reality.

Imani Gandy:

Just like with the question of is a fetus a person, the court concluded both rounds of arguments with no clear sense of where the Justices were leaning in terms of finding a state interest to restrict abortion. And remember the extent of the state interest would depend on whether the court found abortion to be a fundamental right.

Jessica Pieklo:

Constitutional law always has so many steps. Oh my God.

Jessica Pieklo:

Anyway, good news first. The court would ultimately rule that abortion is a fundamental right.

Imani Gandy:

Huzzah!

Jessica Pieklo:

But.

Imani Gandy:

There's always a but. Why is there always a but, Jess?

Jessica Pieklo:

There's always a but. Even though abortion is a fundamental right, the court also found that states do have a legitimate interest in regulating the safety of abortion both for the benefit of providers and for patients. That's the state interest in health and safety. We see that interest asserted today in cases where states are defending things like requiring providers to have admitting privileges at nearby hospitals. The power the state is asserting in those cases comes from this finding in Roe.

Imani Gandy:

And there's more. The court also found that states have some interest in protecting "prenatal life" and could regulate abortion based on that interest as well and that's what we see in the most restrictive abortion bans sweeping the country today. States asserting an interest in protecting fetal rights.

Jessica Pieklo:

Well Imani, we've done it again. We've given listeners a lot of information and I think we should probably recap.

Imani Gandy:

That is definitely a good idea.

Jessica Pieklo:

This episode was all about state power to restrict abortion rights and in constitutional law talk, that means the state's interest in restricting abortion rights. The state of Texas offered up a couple of different reasons why it could have an interest in regulating abortion, including for health and safety reasons, and to protect fetal life.

Imani Gandy:

Don't forget about preventing promiscuity.

Jessica Pieklo:

And to prevent promiscuity. The state of Texas didn't offer up a lot of support for those arguments, but that's the theme of the series so far.

Imani Gandy:

Sarah Weddington argued that because abortion is a fundamental right, whatever state interest Texas claimed needed to be a compelling one.

Jessica Pieklo:

And she reminded the Justices that the state of Texas hadn't done its homework and couldn't offer up any evidence that any of the proposed state interests were compelling.

Imani Gandy:

That's when we talked about strict scrutiny and Jess, you know how I love talking about strict scrutiny.

Jessica Pieklo:

And finally we talked about how the court would ultimately settle on health, safety, and an interest in fetal life as legitimate state interests.

Imani Gandy:

Okay, I got to get this off my chest.

Jessica Pieklo:

Oh boy.

Imani Gandy:

It's something that's bugged me about Roe forever. And this episode really drove it home for me.

Jessica Pieklo:

What's that?

Imani Gandy:

What does it mean to "weigh one life against another" in the abortion rights context if one of the "lives" in question isn't a "person"?

Jessica Pieklo:

That just blew my mind for a minute, but go on.

Imani Gandy:

Well, hold onto your butt, Jess. Because Texas didn't stop there. They had the unmitigated gall, unmitigated gall, to argue that pregnant people don't even have a right to be making these arguments in court in the first place.

Jessica Pieklo:

And that's what we'll talk about in the next episode of We'll Hear Arguments,

Jessica Pieklo:

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

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Jessica Pieklo:

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