

## [Boom! Lawyered: What a Challenge to 'Roe' Will Actually Look Like](#)

- Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that wants to [shouts] stop the fucking bans!
- I'm Imani Gandy.
- Jessica 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. And the team legal podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: So Jess, it's been a bananas couple of weeks with all of the abortion bans and near total abortion bans that states have been jamming through their legislatures. And all the will they won't they talk about the Supreme Court overturning Roe. There's the Alabama total abortion ban. The Georgia near total abortion ban. Let's just say shenanigans are afoot. So I decided earlier this week that I was going to do something that I hadn't done in a while.
- Jessica Pieklo: Let's see, yell at people on Twitter?
- Imani Gandy: Oh Jess, Jesus Christ. You know I do that every day.
- Jessica Pieklo: No, you're working on being nicer Imani.
- Imani Gandy: You're right. I have.
- Jessica Pieklo: Come on. I'm giving you credit where credit is due.
- Imani Gandy: Thank you. I really appreciate it.
- Jessica Pieklo: Mildly irritated black lady is what you are going for sometimes.
- Imani Gandy: Exactly right. But what I actually was talking about is I decided to make myself a nice cup of coffee and read Roe v. Wade. Really read it.
- Jessica Pieklo: Okay, I know you've read Roe before though obviously. Right? You have.
- Imani Gandy: Yeah. Obviously I've read Roe tons of times. But this time, I read it through a different lens. The lens of "oh my God, we are marching towards Gilead, and I look positively dreadful in a white bonnet."
- Jessica Pieklo: Oh god no. I know what you mean though, because I also re-read Roe this week, and it essentially drove home just how potentially fucked we are.

Imani Gandy: Indeed. And that's what we're going to talk about today. Roe vs. Wade was a landmark case that ruled state criminal abortion bans were illegal. It also ruled that a fetus is not a person for purposes of constitutional analysis.

Jessica Pieklo: And that is the gold ring the anti-choice movement is gunning for. And if they succeed, they will not have just gotten the court to endorse the most restrictive abortion laws this country has seen in, I don't know, hundreds of years. But they will have potentially provided a new path for conservatives to challenge state laws that affirmatively protect abortion rights.

Imani Gandy: Alabama's ban is designed to strike directly at the heart of Roe. And while some people in the GOP have tried to distance themselves from the measure, the reality is conservative lawmakers in Alabama and Missouri, and Louisiana, and Ohio, and a whole bunch of other fucking states, see this as an opportunity to try and end legal abortion as we know it. There's been a lot of talk about these state laws challenging Roe, and so we thought that we'd walk you through just what that means.

We're going to go through the Roe decision in some detail, and we are going to examine how, paradoxically, that decision might have set itself up to be overturned. And we're going to lay out the legal strategy that a challenge might follow in order to overturn Roe vs. Wade.

Jessica Pieklo: And I'd like to issue an important warning for our listeners before we continue on with this episode. This one is not for the faint of heart. This episode is for the true law nerds. Now I know we've said this before, that this episode is a doozy and we're really going to get into it and all that. But those episodes were cakewalks compared to this one. So strap in if you dare.

Imani Gandy: Ooh child.

[music]

Jessica Pieklo: Imani, where do we begin?

Imani Gandy: Let's begin by talking about Roe v. Wade. And listeners, if you haven't read Roe v. Wade, might I be so presumptuous as to give you a homework assignment? Go read Roe. Go read it. You can stop the podcast right now, and go read it. I've tweeted my highlighted copy, and we will add a link to that in the show notes. So you can just read the highlighted sections to gain a better understanding of what we're talking about here. But if you're a true law nerd, you're going to go ahead and read the entire majority opinion.

But even if you've read it before, give it another read. Of course we're going to explain it to you. But who doesn't like it when a couple of podcast hosts dole out homework assignments? It's very Justice Breyer of us.

Jessica Pieklo: Sooo Justice Breyer. Listen, I'm going to assign all of you attorneys homework before I give you a 20 minute soliloquy about this case from the bench. But no really, let's talk about Roe.

Roe said that state criminal abortion laws that only offer an exception to save the life of a pregnant person and without any regard to what stage in their pregnancy the patient is in, those violate the Due Process Clause of the 14th Amendment. Now, the Due Process Clause of the 14th Amendment protects the right to privacy against state action, including a, "qualified right to terminate a pregnancy." The court concluded the right of personal privacy includes the right to an abortion. But that right is not unqualified, and it must be considered against important state interest the court said, like protecting patient health and even advancing fetal life. The court also said that a "person" for constitutional purposes does not include the unborn.

Imani Gandy: And we have a lot of precedent backing up these key points right now, right? We've got Planned Parenthood vs. Casey, which modified Roe's holding to give us the undue burden test in place of the trimester framework that Roe set up as a regulatory framework. And we'll talk about that a little bit later. And more recently in 2016, Whole Woman's Health vs. Hellerstedt upheld both Roe v. Wade and Planned Parenthood vs. Casey. But, like Justice, Stephen Breyer, the data nerd, the homework provider, warned us last week: Precedent is just another word for nothing left to lose, or something Janis Joplin.

Jessica Pieklo: Good grief. When it comes to abortion rights, that's it. But let's get into it. Let's get into Roe and talk about the facts of the case.

Imani Gandy: All right. Here we go.

A pregnant single woman, Jane Roe, brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. Now, Roe alleged that she was unmarried and pregnant, that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe clinical conditions." She also alleged that she was unable to get a "legal abortion" in Texas because her life did not appear to be threatened by the continuation of her pregnancy. And she alleged that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions.

She claimed that the Texas statutes were unconstitutionally vague, and that they abridged her right of personal privacy protected by the First Amendment, the Fourth Amendment, the Fifth Amendment, the Ninth Amendment, and the 14th Amendment.

By an amendment to her complaint, Roe then purported to sue on behalf of not just herself, but all other women similarly situated, which is a legal term

meaning all other women who are sort of in the circumstances that I am. Unmarried and pregnant, and wanting an abortion.

Jessica Pieklo: And I just want to pause for a second and think about how radical it is to present yourself to the court with a constitutional claim for basic health care. In the context of so much of what we're fighting about not just with abortion bans but I think the ACA. To have the legal claim be like, "I have a right to access a medical procedure performed by a competent licensed physician under safe clinical conditions." That's wild. Anyway.

Imani Gandy: So those are the facts of Roe. Let's get into what the decision actually said.

Jessica Pieklo: Sure. So Justice Harry Blackmun wrote the decision for the majority, and I like talking about Justice Blackmun because he's kind of an interesting guy. So he's a Nixon appointee. You think he'd be pretty conservative Republican appointee, but it turns out that he became one of the most vocal proponents of abortion rights on the court. He was raised in St. Paul Minnesota and worked in big law there. He worked for one of the law firms Dorsey Whitney which is your white collar, white shoe professional firm where he represented the Mayo Clinic. And a lot of folks talk about how this relationship that he had early in his career working in the health law industry and at Mayo and with doctors probably shaped a lot of the decision in Roe, and why so much of it is grounded in a patient's relationship to their doctor.

Imani Gandy: So the decision says that state criminal abortion laws that contain only an exception for the life of the pregnant person and without regard to the stage of the pregnancy that that person is in, those abortion laws violate the Due Process Clause of the 14th Amendment. Now the Due Process Clause protects the right of privacy against state action, and that includes a patient's "qualified right to terminate her pregnancy." The state can't override that right, but it does have a legitimate interest in protecting both the pregnant person's health and the potentiality of human life. Now each of these interests grow and reach a compelling point at various stages of the pregnancy as that pregnancy approaches term.

Jessica Pieklo: Right. And Justice Blackmun's decision approaches this as a balance of harms. First it looks to the harm done to patients when they're forced to carry a pregnancy to term. Right? He looks at things like: there can be medical harm both physical and emotional. And he examines the added cost of a child, and the stigma associated with what he called "unwed motherhood." But then he goes on and says that states do have important interests in safeguarding health and in maintaining medical standards and protecting fetal life. So already, kind of got to point out that already here, abortion rights are in a state of compromise. Good decision--defined in compromise, though, against the state.

Imani Gandy: And then Blackmun goes on to address the fetal personhood argument that Texas had put forth. Texas argued that a fetus is a person under the 14th

Amendment. Justice Blackmun specifically says that if the court accepts that argument, then their case for a right to an abortion collapses. And he goes through the history. He talks about how the Constitution doesn't define "person" in so many words. Section 1 of the 14th amendment contains three references to the term person. The first is in defining the words citizens. And it speaks of "Persons born or naturalized in the United States." The word person also appears in the Due Process Clause, and in the equal protection clause. The word person is also used in other places in the Constitution, for example in listing the qualifications for becoming a representative or a senator.

Jessica Pieklo: And this is super, Imani. You wrote an entire piece on this--the difference between legal personhood and...I'm not going to say this correctly. I'm going to mangle it. Juridical?

Imani Gandy: Juridical.

Jessica Pieklo: Juridical personhood! But it's an important distinction. And Blackmun going through it really from a law standpoint does the work. Right? He shows all of the ways in which this is a legal argument just out of the gates from the text. Scalia and all the originalists love the text. Why, from a textual perspective, this argument should just be a non-starter.

Imani Gandy: Right. And just to give our listeners a little bit of context on the debate between what a person is, a natural person versus the word that Jessica mangled a bit, juridical person:

So a natural person is what you think of when you think of a person. It's a person who's breathing, is a person who's alive. And they have all of the rights that are normally associated with being an alive breathing person. Juridical personhood refers to artificial persons. And now we're talking about stuff like "corporations are people too, my friend." These are rights that are granted to "persons" by the state. They're not rights that attach at birth because corporations aren't born. But people, natural people, have certain rights that attach as soon as they're born.

Jessica Pieklo: Yes.

Imani Gandy: So there's a very clear distinction that anti-choicers are trying to muddle. This distinction between natural personhood, and juridical personhood. But moving on.

So in his opinion, Justice Blackmun says, and I quote. "All of this together with our observation that throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today, persuades us that the word person as used in the 14th Amendment does not include the unborn." Texas had argued that it did. Blackmun just smacked them down and said no it doesn't. Texas also argued that apart from the 14th Amendment, life

begins at conception and is present throughout a pregnancy. And therefore, because life begins at conception, the state has a compelling interest in protecting that life from and after conception. He said, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man's knowledge is not in a position to speculate as to the answer."

Jessica Pieklo: Can we take a moment, and appreciate the judicial restraint here? We talk about judicial activism all the time when it comes to abortion politics in particular. But here is a Supreme Court justice saying there are some areas where it is just not appropriate for the court to be the final decider. And a determination on when life begins is one of those points. In this day and age, it's a radical statement of judicial restraint, and it blows my mind.

Imani Gandy: It's also super refreshing.

Jessica Pieklo: It is. It's really refreshing. And again, this whole opinion is Blackmun doing his work because he does it here too. He notes all of these divergences, right? For example in Judaism, life begins at birth. That's what the Stoics believed too. And going back to the common law abortion laws that were on the books, quickening was a definitive marker from when an act would be considered manslaughter, for example. And even Catholicism had this conception of ensoulment of when life begins, and that wasn't at conception. That was when typically tied to quickening, when you could feel some sort of movement. And it's all kind of wrapped up in what doctors have as viability. None of it was "life begins at conception."

But let's recap because wow, we promised listeners this was going to be a lot, and we just gave them a lot.

Imani Gandy: Yeah.

Jessica Pieklo: So if Roe legalized abortion and punted on the question of when life began, it also created a roadmap for the kind of abortion restrictions we're seeing today that could ultimately undo that decision, huh?

Imani Gandy: Yeah. And that's what was wild to me when I reread the case through this new lens of "fuck me, we're headed towards Gilead," right? Because the court takes Texas to task. Blackmun takes Texas to task and explains all of these things that Texas does that demonstrates that even Texas doesn't believe that life begins at conception. And so by making this roadmap, it ensured that the premise of Roe, the underlying premise of Roe--which is that pregnant people have a constitutional right to an abortion up to the point of fetal viability--that basic premise was in danger the moment that the Court issued the decision. As soon as the Court issued the decision, it just activated the anti-choice movement. Right?

Operation Rescue was born. All of this “baby killers” and “abortion is murder,” and all of this angst and this tortured nonsense that we see from anti-choicers was born the day that the Roe decision was issued.

Jessica Pieklo: Right. And Justice Blackmun started issuing warnings in 1989 that Roe was in danger. First in a dissenting opinion in Webster vs. Reproductive Health Services, right? That decision upheld Missouri's ban on state funding going to abortion services. And it also upheld a provision that mandated testing for fetal viability at about 20 weeks. That case also involved a challenge to a provision in the preamble to the Missouri Constitution that said Missouri state laws are to be interpreted to declare the "unborn people." The Court punted on whether or not it needed to consider the constitutionality of the Missouri preamble since the abortion restrictions at issue weren't based on it. But oh boy, was it a big case.

Imani Gandy: And this is really important. A lot of folks don't really talk about Webster v. Reproductive Health Services. But it is a very important case. And especially at this moment, because we have that Georgia law. We talked about this Georgia law. I think it was either last week or the week before.

Jessica Pieklo: Two podcasts ago.

Imani Gandy: Okay, yeah. Time is a flat circle. Who the fuck knows?

But we talked about the Georgia law, and we talked about how that Georgia law was based on the Georgia Constitution. We were comparing that to the way in which the Kansas Supreme Court based its ruling that abortion is a fundamental right on the Kansas constitution.

So we've got these two constitutions that essentially talk about the same stuff. Due process, fundamental rights, yada yada yada. But Georgia is now saying that those constitutional rights are there to benefit the "unborn," while Kansas said those constitutional rights are there to benefit pregnant people who want to terminate pregnancies and exercise bodily control. Right?

Jessica Pieklo: Right.

Imani Gandy: So the Georgia six week ban has this preamble. And a preamble is essentially introductory language in a piece of legislation. And that preamble says what the mission of the law is, and the power that the legislature has to pass that law. The Georgia six week ban starts by invoking the Georgia State Constitution and state constitutional guarantees that, "All men are created equal and guaranteed life, liberty, and due process."

The bill then immediately pivots to the section that says, "Modern medicine has advanced from the time of Roe v. Wade and Planned Parenthood v. Casey, to

the point where the Georgia legislature is now within its power under its own state constitution to provide full legal recognition to 'Unborn children.'"

Jessica Pieklo: Yup.

Imani Gandy: So the court in Webster, this Webster case that we're talking about, may have punted on the question of the constitutionality of the Missouri preamble. That's Missouri's introductory language in the legislation, when it issued its ruling in Webster.

But Georgia has teed up this issue for the court again. So the court can examine this issue of preambles, and language that talks about fundamental rights, and life and liberty, and who those rights apply to. The court can now make a ruling that no reproductive rights enthusiast is going to like. And that ruling is these benefits that state constitutions talk about in your to the fetus, the "unborn child," the blastocyst, the egg, the embryo. And not to the person who is carrying it.

Jessica Pieklo: It's really wild to just lay it out there to say here is one open point from a case from Roe and moving forward, that the anti-choice movement has clearly so specifically seized on. Right?

Imani Gandy: Absolutely. So let's continue to talk about Webster. Because again, it's one of those cases that people don't talk enough about and I feel like our listeners ... By this point, you're really really into hearing about Webster. Right listeners? Am I right?

Jessica Pieklo: You're invested in this.

Imani Gandy: You are so super invested. Your ears are glued to your AirPods or whatever.

Jessica Pieklo: So Webster was a plurality decision. And let me read you the lineup because wow. We've got Chief Justice Rehnquist at the time. Justice White who was one of the dissenting justices in Roe. And his dissent is terrifying and fire, but it is literally like, "No, if you're pregnant, you deserve to be pregnant. Stay pregnant forever, too bad, so sad." That is his dissent. Justice O'Connor, Justice Kennedy, and Justice Scalia was the fifth vote. So we have Justice Sandra Day O'Connor, who has been the compromise and I think will probably go down in history as the saving vote in this period of time for abortion rights on many ways, creating some weird mucked up plurality with Scalia, and Rehnquist, and White.

Imani Gandy: Yeah, it's bizarre. And why don't you explain what exactly a plurality decision is? Because that's important.

Jessica Pieklo: Oh yeah. No, that's a good idea. We're throwing around a lot of terms here.

Imani Gandy: It's also important to note that Planned Parenthood vs. Casey was also a plurality decision. So we kind of get this pattern of these people not being able to make up their goddamn mind when it comes to abortion right. But what's a plurality decision?

Jessica Pieklo: Yeah, that's exactly what it is. A plurality decision is where you have an opinion where everybody agrees on the outcome. So the vote is like 5 to 4. The Missouri restrictions will be upheld. But nobody offered a single agreed legal path on how to get there. So some of the justices said, "They should be upheld because Roe was a garbage decision and abortion should never be legal." And some of them said, "Well no they should be upheld because in this constant, there is a compelling interest for this state." And that is effectively what set Blackmun off. Right? So he issues this dissent in Webster that says basically, "Everybody, Roe is on fire." He said it's bad, and this is 1989. Roe is on fire in 1989.

Imani Gandy: 1989.

Jessica Pieklo: He wrote that the plurality's approach in how they resolve this would allow a state to put virtually any restriction on abortion so long as it was rationally related to promoting potential life, and that this in effect would overturn Roe. Those are prescient words today, right?

Imani Gandy: Yes they are. They really are.

Jessica Pieklo: I mean look at the restrictions that we're talking about, and here we are. So he also noted that the plurality and Scalia together were one vote, in 1989, one vote from effectively overruling Roe. He wrote, "I fear for the future, and a chill wind blows."

Imani Gandy: Brrrrr.

Jessica Pieklo: For 1989 standards though really, his dissent is worth the read.

Imani Gandy: Absolutely, it's fire.

Jessica Pieklo: And he'd re-up these warnings in Planned Parenthood vs. Casey in another dissent where he said basically, "It's bad guys. It's really, really, really bad."

Imani Gandy: And then here we are in 2019. And Justice Stephen Breyer picked up that very same thread last week, right? We talked about this in the Franchise Board case, the case about the revenge tax audit. And the big difference is that now, we have the conservative makeup that Blackmun warned us about back in 1989 in this Webster case. And that conservative court is itching to overrule Roe.

Jessica Pieklo: Right.

Imani Gandy: So when we talked about the Franchise Board case, this revenge tax audit case, Breyer issued a dissent and said basically, "Guys, abortion rights is hella on the line man. Seriously, abortion rights are on the line. I don't know who's listening. You guys paying attention to what these fuckers are doing? Abortion is on the line. Everything is on fire."

Jessica Pieklo: We did. We talked about it last week. Go back and listen to it because the warning is stark, right? And there were factors. We have factors, Imani.

Imani Gandy: We have factors. Lawyers love factors. We love factors, we love tests, and we love prongs.

Jessica Pieklo: Give me a prong!

Imani Gandy: Got to love a prong. So let's talk about these factors that Clarence Thomas set forth in the Hyatt opinion, the revenge tax audit opinion, to justify the court overturning 40 years of precedent in that case to give states more immunity from being sued. That's what the Hyatt case was about, sovereign immunity. Go listen to that episode. We explain it all very clearly. As clearly as a couple of half-drunk law nerds can.

But the factors that Thomas cited were one, the quality of the decision's reasoning. Two, its consistency with related decisions. Three, legal developments since the decision. And four, reliance on the decision. Those are your prongs people.

Jessica Pieklo: Right. Grab a prong. We're going to dig in.

Imani Gandy: Grab a prong and let's dig in.

Jessica Pieklo: Last week in that episode, we talked about the fact that conservatives hate the reasoning of Roe and Casey, right? They've been criticizing it in every turn. Legal opinions, public speaking events. If you want to make it on the conservative judicial circuit, then you hate Roe and you talk about it being garbage reasoning.

Imani Gandy: Absolutely. But let's focus a little bit. Let's focus on the legal developments since the decision prong of the test that Thomas laid out in that Hyatt case.

Jessica Pieklo: Sounds good.

Imani Gandy: One of the purposes of all of these bans is so that conservatives can essentially lie about public perception of abortion, right? They will say that they have proof that the public has returned to being anti-abortion, and they will cite these bans that conservative lawmakers and other anti-choice lawmakers have passed as proof that the public is anti-abortion. But here's the thing, y'all. The public was never as anti-abortion as the dude doctors who wanted to control the marketplace thought that they were.

And I tweeted out an article just the other day about this. This article about the history of abortion laws, and how essentially no one seemed to give a shit about women's health before I think 1857, which is when the American Medical Association was formed. And of course the AMA was chock full of white dudes. And they were a little bit looking askance at the women, the midwives and the other, "Oh my God, they're a witch," type of women who were handling women's health care, who were performing abortions. Because they thought that the purview of abortion and the purview of women's health, they finally decided they gave a shit. So they wanted to take all of that away from the women who were already doing it because they saw these women as competition.

And let's sit with that for a moment, right? That is entirely screwed up. You've got millions of people in this country who are hanging their anti-choice hat on the fact that it's immoral, and it's based on religion. And for centuries and centuries it's been immoral, and everyone is always hated abortion throughout time.

That's simply not the case. People started hating abortion in the middle of the 19th century because dudes were pissed off that women had taken over and were doing medicine. And women don't "do medicine." They're supposed to be at home raising kids, not aborting them for God's sake. "You're aborting children." Of course you don't abort children because children can't be aborted. That's a side note. But I just really want y'all to just focus on just the capitalism that has been driving abortion rights discussions. It's fucked up.

Jessica Pieklo: In the legal profession, enabled that too. Because while the medical profession is helping professionalize this and cut women out and create this ridiculous sentiment around it, the American Bar Association was essentially like, "Yep, sounds good to us. Women shouldn't be practicing law either, so fuck them." But we digress.

Imani Gandy: We digress. So back to these bans. Georgia. Georgia's ban is directly grounded in Georgia law, just as Kansas' ban was directly grounded in Kansas law. But this Georgia law, and the preamble, and all the nonsense about personhood is a direct response to that part of the Webster case where the court decided to avoid the Missouri preamble. Georgia wants the Supreme Court to look at its preamble, to determine that its preamble is perfectly constitutional, and then let Georgia and then all of the other states are sure to follow. Do whatever the hell they want when it comes to bodily autonomy in their state constitution.

Jessica Pieklo: Meanwhile, we have Alabama, right? We've got Alabama. We've got Alabama taking directly the argument that the courts can't determine life at conception, right? They are taking this on directly. They say, "That's not true. The science has changed." That's also not a new argument though, right? We've seen this before. In the first rounds of all of these ridiculous bans of the six week bans in places like North Dakota or Arkansas's 12 week "heartbeat ban." Attorneys

there argued that the fact that a fertilized egg could "survive" for a few days without being implanted was proof that fetal life was wholly independent at conception. The degree to which we start to veer into some science fiction stuff is really kind of wild.

They also argued in those cases that states now because they all have safe haven laws, those are where a parent can surrender a newborn without prosecution for abandonment. Because now, all 50 states have them and at the time Roe was decided that wasn't the case. Means we don't need legal abortion either. Safe haven law, so who needs abortion?

Imani Gandy: That makes a whole lot of sense. We just talked about how the Georgia ban is aimed at Webster. They want the court to take a look at its preamble and decide, "You know what? It's fine. Personhood in your state constitutional, super sweet." There are other bands that are aimed at tackling the failures that the Supreme Court pointed out in Roe vs. Wade with respect to Texas' position in Roe that a fetus is a person. So for example, in Roe, the court said that no fetus had ever been included on a census in Texas.

Jessica Pieklo: Reasonable.

Imani Gandy: The court also said that while Texas urges that a fetus is a person entitled to 14th Amendment protection, Texas doesn't prohibit all abortions. So the court basically asked if a fetus is a person, why is it that in Texas, the pregnant woman is not a principal or accomplice with respect to the abortion that is performed on her? That seems like a pretty reasonable question right.

Also, if a fetus is a person, why is the penalty for criminal abortion significantly less than the maximum penalty for murder? Here's another one. If a fetus is a person, why is the fetus deprived of life without due process of law even in the case where the mother's health is at risk?

Jessica Pieklo: Also reasonable. One of the things that's so brilliant about Blackmun's decision for as many critiques of it that I have, and I have plenty, is just the degree to which they lay waste to the personhood argument by pointing out what you just did. These not really out there questions like if you're going to allow an exception for abortion in certain circumstances in your law, doesn't that by definition mean some of those are ... That there are times when the pregnant person would be an accomplice in murder? That's how lawyers think. That's what we're trained to do, right?

Imani Gandy: Absolutely. So while those questions were amazing and great at the time, they've turned into a roadmap that states have been using in the past 46 years to address what the court saw as failures in Texas' argument, right?

Jessica Pieklo: Totally.

Imani Gandy: States have been making their "Fetuses are people too" arguments stronger based on what Blackmun said Texas' failures were. So we're seeing states trying to include fetuses on the census for example. Alaska just introduced such a law saying that "unborn children are residents of Alaska for purposes of the census," specifically. There are also states that are passing total abortion bans with no exception for rape or incest in order to address that question of if a fetus is a person then-

Jessica Pieklo: How can you ever have an exception?

Imani Gandy: Exactly. Exactly. And so since 1973, something like 38 states have passed fetal homicide laws that contain personhood language. And this again is just another attempt by states to shore up their fetuses are people too arguments and be able to present a stronger case the next time such a case would appear before the Supreme Court. Now we know that's coming up pretty goddamn soon.

Jessica Pieklo: Right.

Imani Gandy: So now we need to talk about how these new abortion restrictions would end Roe. These new abortion restrictions which are targeted at Roe vs. Wade, and at the failures in Texas' position in Roe vs. Wade. And also targeted at the Webster case that we talked about that involved the Missouri laws. How is it that these restrictions are going to end Roe? Jess, help me.

Jessica Pieklo: Before we start talking about how these restrictions could end Roe, I got to do my Jess thing and talk about the fact that we have three cases right now already before the Supreme Court that have the potential to do real harm to abortion rights. So the first is out of Indiana, and it's a ban on abortions due to the race, sex, or disability status of the fetus. And it also has some fetal remain, burial remain requirements. That's the first one.

The second one also out of Indiana. Everybody wave hi to Mike Pence. Thank you for these cases. And that one mandates an ultrasound delay. We have a third one from Alabama that's a challenge to their D&E ban. That's the most common form of later abortion. That's teed up. The Court has looked at that a couple times too, hasn't acted on any of those. And we also have the Louisiana TRAP case, so I guess potentially four and we've covered that. I'm so much less worried about that one though that I kind of sometimes forget it even exists.

Imani Gandy: Right. And we've previewed all of these cases, and we've done some podcasts on these cases. So we're not going to go over them right now. But what we will say is that they all pose a grave threat right this minute, right now, to abortion rights precedent. But none of them strike at Roe and Casey's holding that the "unborn are not people for constitutional purposes."

So when your uncle tells you, "Don't worry, the court won't overturn Roe. They're just going to gut it to oblivion." You can make like Sansa Stark and tell

him to have a seat, because the court is very, very capable of first rendering Roe absolutely meaningless before it proceeds to overturn it entirely.

Jessica Pieklo: No, that's what these cases are teed up to do is ... We talk about they're going to overturn Roe and so that means end legal abortion. But the how in that is by getting to this declaration that the unborn are not people for constitutional purposes. And that's the thing that I think we really just need to drive home.

Imani Gandy: All right, so let's drive this shit home.

Jessica Pieklo: I'm so proud of everyone for hanging tight with us.

Imani Gandy: I know. If you are still listening to this right now, I swear to God I'm going to come to your house and put a gold star on your forehead, because you deserve it.

Jessica Pieklo: Everybody earned extra credit.

Imani Gandy: So if a fetus is a person under the law, then states are going to assert abortion protections are unconstitutional deprivations of life. Now we are closer to that sort of dystopian future than you actually may think that we are. Look at for example Alabama and that fucking jackass who opened up an estate for his fetus so that he could then sue the abortion clinic and the abortion pill manufacturer for wrongful death. We did a whole episode on that case. You should go back and listen to it.

Jessica Pieklo: And again, we've got places like Alabama, Georgia, and Missouri, and Tennessee, that have already declared the unborn people under their state constitutions. So conservative attorneys will no doubt point to those states when they're making the arguments as evidence that the tide of public opinion has turned toward creating fetal personhood, right? More and more states in their state laws and constitutions are making these kinds of declarations.

But for those states that have tried to protect abortion rights, a Supreme Court ruling establishing fetal personhood could call those protections into question. Conservatives would argue that federal law trumps state law here.

Imani Gandy: Oh yeah. Now they're all about the supremacy clause. Now federal law matters. Now that federal law says fetuses are people, oh my God. Federal law. We love you. Dude, fuck off. Federal law has said that constitutional right to abortion exists. It's a fundamental right. Up until the point of fetal viability. But what have you jackasses been doing? Trying to roll back viability to six weeks, four weeks, three weeks, two days. It's ridiculous for you to now claim, "Oh my God, we super love the supremacy clause, and we super love federal law. Oh my God, we love you Supreme Court." Shut up.

Jessica Pieklo: Well especially because of the whole dishonesty in this argument happening right now that what they're saying is, "Overturning Roe wouldn't criminalize abortion. It would just leave the matter back to the states." Oh horseshit. It would leave the matter back to the states that you like. So that would mean that we are in a real battle in states that have declared a state constitutional right to an abortion, like Kansas. Right? Imagine what the landscape in Kansas will be in this fight. So really, it's just uncharted waters here Imani. Uncharted waters.

Imani Gandy: Yeah. We're absolutely in uncharted waters. And what's most frustrating about it is that they are simply wrong about public perception and public opinion of abortion. They're just wrong about it. They are making as if 99% the population is "pro-life." They're simply just enacting the will of the people when they're absolutely not. They're actually going against the will of the people. And studies have shown that when you frame questions about abortion in an accurate, medically scientific way, that people actually change their mind. So for example, if you tell people what a "heartbeat ban" actually does and actually is, people don't support them anymore. Their entire modus operandi is to lie to people, is to make shit up, is to pretend that they really like federal law until they don't like federal law. Right? They love federal law as long as federal law agrees with them. And if federal law doesn't agree with them, then oh my god it's judicial activism and liberals on the court going buck wild.

It's infuriating. It's infuriating, and it's even more infuriating because principles like stare decisis are super important especially in cases like Roe v. Wade where people have spent 46 years relying on the decision. Reliance on the decision was one of those factors, one of those prongs that we love to talk about in Clarence Thomas's decision in the Hyatt case. Reliance on the decision. How many pregnant people over the last 46 years have relied on Roe v. Wade?

Jessica Pieklo: Absolutely. How many medical students, how many providers, how many family members of pregnant people? It is social reliance completely.

Imani Gandy: And this idea that the court is just either going to decimate abortion access which it can do, or overturn Roe. It's cruelty in my view. It really is cruelty. It's an unwillingness to see pregnant people as full people. It's an unwillingness to see women as something other than hosts, which we had that Florida lawmaker who literally referred to pregnant women as hosts multiple times in a hearing on the state floor. It's hard to take. As a woman, as a person. It's really really hard to take. It's hard to believe that there are states who would allow a fetus to have more rights than the pregnant person carrying it.

Jessica Pieklo: And I guess stay tuned, because that's really the question of the day. Will the Court grant a fetus more rights than a pregnant person?

Imani Gandy: Yeah. Yeah. And frankly, I think the court probably will.

Jessica Pieklo: Well on that note-

Imani Gandy: So to recap. We talked about Roe v. Wade and we talked about the ways in which that case set up traps for its own demise essentially, by punting on the issue of personhood. Judge Blackmun issued this amazing decision. That's why I like to call him boss bitch Blackmun. And he explained all the reasons that personhood was a non-starter. But in doing so, he gave examples that provided essentially a roadmap for states to use in order to fulfill the requirements that Blackmun laid out in his majority opinion. Requirements that he said Texas had not met, and therefore Texas did not make enough of an argument to permit the court to rule that fetuses are people.

And post Roe, states began passing laws that exactly meet the standards that Blackmun set forth in Roe v. Wade. And those laws, these laws that exactly meet the standards that Blackmun set forth, have already proven effective in the courts. We saw that in Webster.

Jessica Pieklo: Right. And it feels like we're in the final throes of that now in places like Alabama, and Mississippi, and Georgia, and Kentucky, and Ohio, and Missouri, and all of these states that are going for those last requirements of Blackmun's argument about why a fetus should not be a person. Even Alaska, counting them in a census. They are literally going through the items on the checklist and in state legislatures going one by one and checking them off.

Imani Gandy: And in these final throes, a decision from the Supreme Court that affirms fetal personhood would affect states like Kansas that have found a fundamental right to abortion, because federal law would trump state law. And that would make anti-choice activists very happy because all of a sudden they would be all about the supremacy clause and all about federal law trumping state law. When right now, 46 years of federal law has not been good enough for them.

Jessica Pieklo: That was a lot. We covered so much information. It was like a bar review class in the morning. So if you folks have questions, if you want to continue the conversation, absolutely find us. This is one where I feel like listeners will maybe have follow up questions, have areas they want to dig in. What do you think?

Imani Gandy: Absolutely. And if you have questions for us, please follow me on Twitter @AngryBlackLady. You can follow Jess on Twitter @Hegemommy. H-E-G-E-M-O-M-M-Y. And you can follow Rewire.News @rewire\_news. And join our Facebook group. There are poppin' conversations in there. And if you have questions about this episode if you raise them in that group, we will answer them. And aside from that, fucking congratulations on getting through this episode man. You deserve a prize.

Jessica Pieklo: Cheers all around.

Imani Gandy: Cheers all around. And we will see you on the tubes.

Jessica Pieklo:

See you on the tubes.

Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti who is also our executive producer. And the Rewire.News editor in chief is Jodi Jacobson.