

[Boom! Lawyered: Clarence Thomas Just Declared War on Your Birth Control](#)

Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that is breaking records in terms of downloads, thanks to the terrible fucking news. So, hurray, and boo, I guess? 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: The Supreme Court on Tuesday said that a provision of an Indiana law could take effect. Now that provision mandates the burial or cremation of fetal remains. In that same decision, the Court decided to keep a different part of the law blocked. Now that part bans abortion based on the race, sex, or disability of a fetus.

Imani Gandy: In a separate concurring opinion, Justice Clarence Thomas confirmed what we here at Boom! Lawyered have been telling you. Conservatives are not just coming for abortion rights, they're coming for your birth control, too. In this episode, we explain Tuesday's decision, and what it means for fetal remains requirements, and reason bans, moving forward in other states.

Jessica Pieklo: We also walk through the part of Justice Thomas's opinion that equates modern day family planning with eugenics, and show how it telegraphs the direction the Court's Conservatives would like to take reproductive rights jurisprudence. Hint, they'd like to roll it back about 50 years or so.

Imani Gandy: Shocking.

[music]

We start with the provision of a monster anti-abortion omnibus bill, that was signed into law way back in March of 2016, by then-Governor Mike Pence. Both provisions were blocked by the district court and the Seventh Circuit Court of Appeals. The district court ruled that the state did not have a valid interest in requiring fetal remains to be treated like other human remains, because the Supreme Court has not declared a fetus a person for purposes of constitutional analysis.

Jessica Pieklo: We talked a lot about that week.

Imani Gandy: We really did. We really did. And a lot of our listeners earned their gold stars. And I commend you, I really do.

Jessica Pieklo: Yup.

Imani Gandy: Moving on. The district court also struck down Indiana's reason ban. Now that's the part of the law that prohibits abortions based on the race, sex, or disability of the fetus. Now the district court held that that provision was an unconstitutional pre-viability abortion ban. We've talked about those a lot, right? The six-week bans, the quote unquote, "heartbeat ban". They're all pre-viability abortion bans.

Imani Gandy: The Seventh Circuit agreed with both of the conclusions that the district court drew. Of course it did, because it made a lot of sense. But, Indiana being Indiana, filed a cert petition with the Supreme Court, arguing that the fetal remains provision, quote, "Expands on long established legal and cultural traditions of recognizing the dignity and humanity of the fetus."

Jessica Pieklo: Pffff. Sorry. I'm sorry.

Imani Gandy: I mean, if there ever was a call for a fart noise, it was right then.

Jessica Pieklo: I'm in a mood. It's been a week. I'm sorry.

Imani Gandy: Indiana also argued, the reason ban should be upheld because it is a response to new technology that allows women to, quote, "Make a choice, not contemplate it at the time of Roe V. Wade, the choice of which child to bear."

Jessica Pieklo: Ugh. Groan.

Imani Gandy: Pffff. If I may echo you from before.

Jessica Pieklo: It's just going to be a standard reaction at this point. Oh God.

Imani Gandy: Honestly. So Jess, what happened at the Supreme Court on Tuesday?

Jessica Pieklo: Okay, so the Court on Tuesday issued a per curium opinion that reversed the Seventh Circuit on the fetal remains provision, but affirmed the Seventh Circuit on the reason ban. So let me walk through that a little bit. So, a per curium opinion is an opinion by the Court as a whole that does not identify any particular justice as the author. So it's an opinion literally of the Court, right?

Jessica Pieklo: So what Tuesday's opinion means is that the reason ban remains blocked, but the provision mandating fetal remains be either buried or cremated can take effect. That's the immediate impact.

Imani Gandy: Justice Sotomayor said that she would have denied Indiana's request entirely, and of course the notorious RBG filed a dissent saying that she would have also denied the request. And she also argued that the Court should not have reversed the Seventh Circuit without at least briefing or oral argument on the fetal remains question. And she says that Planned Parenthood would have won.

Imani Gandy: She also threw in a pretty dope-ass footnote that called Clarence Thomas out, but we can talk about that at a later time. But honestly, her opinion's like, one page, and the footnote is the bomb. So go read it.

Jessica Pieklo: It is. It is.

Imani Gandy: So can you explain to me how the Supreme Court could uphold the fetal burial requirements?

Jessica Pieklo: It's a great question, because everything feels really weird right now. In part, they did so because of the way the legal issue was framed in the litigation below. So, during the trial, reproductive rights advocates didn't challenge the fetal burial requirement as an undue burden on abortion rights. Instead, they argued the law treats a fetus as a person. And because a fetus is not a legal person, the State of Indiana didn't have a legitimate basis to mandate fetal disposal methods like it did here.

Jessica Pieklo: The Seventh Circuit said, "Yeah." They agreed. And Justice Diane Wood wrote this really great opinion that said, "Basically, Indiana just couldn't decide that a fetus was a legal person for purposes of constitutional analysis, and start mandating burial or cremation requirements like they did here." But the justices on Tuesday reversed that part of Wood's opinion and cited a 1982 case called *Akron v. Akron Center for Reproductive Health*, for the proposition that the state does actually have a legitimate basis for passing these kinds of requirements.

Jessica Pieklo: What's wild is that case actually upheld an appeals court decision that struck as unconstitutionally vague an Akron ordinance that mandated disposal of fetal remains in a "humane and sanitary" fashion. But here we have the Court using it to justify upholding fetal burial requirements because Imani, we are now in the upside down.

Imani Gandy: But wait a minute though. What about the undue burden standard? It seems like changing the law to suddenly mandate that patients have to bury or cremate their aborted fetuses, embryos, blastocysts, eggs, what have you, that seems like a burden on abortion rights. And shouldn't we be talking about the undue burden standard, as was laid out in *Planned Parenthood v. Casey*? I mean, did the Court mention that at all?

Jessica Pieklo: They did. In fact, the Court went out of its way to say that the decision Tuesday had nothing to do with the undue burden standard. And then, again, that's because in part of how the legal challenge was framed to begin with. So, what the law did was make fetal and embryonic remains the same, more or less, as human remains. And so, it's not what we typically think of as an abortion restriction. Does it feel like one? Absolutely it does. But does the law view them the same way? Unfortunately no, not really.

Imani Gandy: So what you're saying is, the fetal disposal provision doesn't implicate any right that the pregnant person has, because the pregnant person can still get the abortion in the first place, and then on top of that, can still dispose of the fetus in whatever way they want. It's just that if they don't want to, or they want their provider to handle the disposition of the fetus, then the provider has to dispose the fetus in a humane and sanitary way. That seems, that's what you're saying?

Jessica Pieklo: Yeah.

Imani Gandy: But that seems bizarre. That seems like an undue burden. That seems like an extra requirement that you're forcing the pregnant person to make, an extra requirement you're forcing them to face, when they just want to get the abortion and get the fuck out.

Jessica Pieklo: No, that's it exactly. And the law makes that, it slices the apple that thin to say, "Well you know, the pregnant person still has the option to choose how the disposal method happens, so therefore it's not impinging on their abortion rights." Even though everything that you just said is, well it walks like an undue burden, it talks like an undue burden. Shouldn't it be an undue burden? And that's it.

Jessica Pieklo: So, it feels like an abortion restriction, but the law just doesn't really treat it like one, or at least not in the ways that we are accustomed to think about. Also though, let's not let the per curiam nature of this decision, and the fact that the Court kept the Indiana reason ban blocked, fool anybody either, right? I don't see any of that as signs that the Court is going to tread lightly on abortion rights.

Jessica Pieklo: In fact, I think it's kind of the opposite. And I guess I'd say, if you have one takeaway from this episode, it's the idea that Conservatives who have the majority, signaled that reproductive rights are in serious danger Tuesday, right? I think that's what we need to dig into.

Imani Gandy: You're precisely right.

Jessica Pieklo: Right on.

Imani Gandy: Right the fuck on, Jess. You are precisely right. Justice Clarence Thomas seized the day, he carped the diem, with a 20-page concurring opinion, that essentially launches an all-out attack on abortion rights and contraception, and makes it patently clear that the Right is escalating its war on both abortion and contraception. And as they often do, using Black people as pawns to do so. It's very, very irritating to me as a Black woman.

Jessica Pieklo: One of the things that jumps out right away is that Thomas's opinion is an attack on contraception, masquerading as an anti-abortion decision, right? The Justice who rarely says anything all of a suddenly has 20 pages of anti-contraception

garbage in an anti-abortion decision. So he starts off with this attack on substantive due process, and let's talk about that for a second here.

Imani Gandy: Yeah, let's, because substantive due process is confusing.

Jessica Pieklo: But I love it. It's so good. It's super sexy.

Imani Gandy: It's the best kind of due process. If I had a choice between substantive due process and procedural due process, I would totally pick substantive due process.

Jessica Pieklo: Totally substantive. All right. So substantive due process is the sexy part of the Fourteenth Amendment. That's the part of the Fourteenth Amendment that privacy rights flow from. And those privacy rights cover stuff having to do with your sexual and family matters, like abortion, contraception, and "homosexual conduct". The law's language here is always so wild.

Imani Gandy: Yeah, "homosexual conduct." It's like, all right buddy. Anyway.

Jessica Pieklo: So Thomas starting an abortion concurrence. And a concurrence is just like, "Yes, and, I'd have some other things I'd like to say." 20 pages of them in fact, right?

Imani Gandy: For Thomas, which is a lot.

Jessica Pieklo: So starting an abortion concurrence going straight after the right to privacy should give us all significant pause, right? Because that signals this is about more than just abortion rights.

Imani Gandy: And the way that he goes into this right of privacy rant of his, is very bizarre. He starts by going after the reason ban, that's the, "no abortion if the reason is for sex, race, or disability." Which, can I just do a sidebar real quick? I really think it's amusing that states have been trying to pass these race bans, because I don't know of any Black woman or any woman of color who goes into the doctor and says, "Doc, you know, tell it to me straight. Is my baby Black?"

Imani Gandy: If you are a person of color, the likelihood is that you're going to have a baby that's a person of color, a baby of color, if you will. Unless we're talking about, I don't know, racist dads of white women who are banging Black dudes, and are forcing their daughters to get abortions. That's where we are. We're either talking about coercive abortions from racist people, or really clueless Black women who somehow have no idea that a baby of color, baby gestating in their womb of color. I mean, ugh. But anyway, that's just aside.

Jessica Pieklo: That seems to be what Thomas suggests though. I don't want to dive too far into that aside, but he really seems to suggest that Black women are like, "What?"

Imani Gandy: "How dare you? I am not having a Black baby." Goddamn.

Jessica Pieklo: I'm sorry.

Imani Gandy: But the way he really gets into this whole mess is by launching into this tirade about eugenics, and this tirade about Margaret Sanger, who is the founder of Planned Parenthood, and who is much maligned as someone who wanted to use eugenics to exterminate Black people. And we're going to get into that a little bit later.

Imani Gandy: But in his concurrence, Thomas says that laws that ban pre-viability abortions based on sex, race, and disability, "promote a state's compelling interest in prevention abortion from becoming a tool of modern day eugenics."

Jessica Pieklo: I'm shaking vigorously. You can't see me shaking.

Imani Gandy: No. No. To make this claim, Thomas essentially reduces eugenics, which is a population-wide effort to, "improve the population by controlling which pregnant people are allowed to have kids and which aren't." It's not about individual choices. It's not about an individual pregnant person's choice to terminate an individual pregnancy. But he makes those individual choices and sort of wraps them all up, and calls them eugenics. And that is not only super dangerous, it's also super disingenuous.

Imani Gandy: Conservatives have been trying to frame these reason bans as "eugenics bans", and Thomas does a lot of the work for them here. He just says, "Basically, abortion is eugenics, birth control is eugenics, and the Court is going to have to step in and figure all this shit out."

Jessica Pieklo: Yeah, I mean, that's really what he says. I'm just gesticulating wildly and shaking my head vigorously. That's about my reaction to where we're at, because he flat out says, "Look, the reproductive rights movement is engaged in a eugenics campaign, and it's going to be up to the Court to stop it."

Imani Gandy: That's right. That's exactly what he's saying. He actually said specifically, "Given the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana's." So, he's basically accusing scores of pregnant people and scores of abortion providers as participating in some Hitler-esque eugenics plan, and that's supposed to be acceptable? That's supposed to be acceptable rhetoric from the bench?

Jessica Pieklo: And we've been following Justice Thomas and his views on abortion for a while, and I've got to say, this is a shift in rhetoric and tone for him. People have talked about the Alabama ban, and Republicans will back away from it, because nobody really wants to punish pregnant people or anything like that. Here we have a sitting Supreme Court Justice who says basically, "I'm open to the idea."

Imani Gandy: Yeah, and that's absolutely right, and particularly because, this is an opinion in which he's actually attacking people making decisions to terminate specific pregnancies. So if a particular person has decided for whatever reason they are terminating this pregnancy, for example because, they find out the baby is going to have Down Syndrome, or some other sort of genetic anomaly, he's essentially calling those people participants in a eugenics plan.

Imani Gandy: And that's a really, really messed up thing to say, especially about pregnant people who are already navigating these very difficult and turbulent waters, in an effort to exercise their reproductive freedom.

Jessica Pieklo: Yeah, and it calls back to all of that Black genocide garbage that has been debunked so many times, right?

Imani Gandy: Yeah, let me talk about that Black genocide garbage for a minute. You know, listeners, dear listeners, four years ago, I wrote a piece about Margaret Sanger. It took me a couple of months to write, I ended up winning an award for it. I would say it's probably the best thing that I've ever written.

Jessica Pieklo: It's brilliant.

Imani Gandy: It's brilliant. I don't often toot my own horn, but I'm tooting. Root-toot-toot-toot-toot-tooo! I'm tooting my own horn, it was a really good piece. I read Justice Thomas's concurrence, and I thought to myself, "This dude read my article."

Jessica Pieklo: He did.

Imani Gandy: And I remember, and I slacked you and said, "Jessica, I think Clarence Thomas read my article." And you said, "Certainly his clerks did." And it feels like his clerks read my article and then crafted an opinion around it. Just like, they wrote around it. Because what I argued in my Sanger piece based on research, not just my own research, but the research of brilliant legal scholars like Dorothy Roberts, for example, who wrote this book called, Killing the Black Body. If you have not read it, go buy it and read it. It is-

Jessica Pieklo: Mandatory homework.

Imani Gandy: It's essential. So you know, I read her book, and I read other sources, and I read Margaret Sanger's own words, and I came to this conclusion that she was basically a white feminist of her time. You know how there are current white feminists who are kind of woke, but they say racist shit, and they believe racist shit about Black people, or Muslim people, or what have you.

Imani Gandy: But overall, they're relatively decent people. And if you were to sit them down for a minute and explain how some of the shit they're saying is racist and messed up, they'd likely understand it. Margaret Sanger was that, but like in

1920, 1930, right? She was on this birth control crusade. She didn't care who she had to talk to in order to make sure that people got access to birth control.

Imani Gandy: And that led her to do some pretty stupid shit, like go to the KKK, the ladies of the KKK, and propose, "Hey ladies of the KKK, want some birth control?" Which I personally would not have done. But she was that fanatical about birth control, that she was willing to talk to anyone. And while she started out as a pretty hardcore feminist who believed that women had a right to sexual gratification, which was a groundbreaking notion in 1930, 1920-

Jessica Pieklo: Wow, that's huge, yeah.

Imani Gandy: Right? I mean, no one thought that.

Jessica Pieklo: Yeah.

Imani Gandy: She believed that women at the time had the right to plan their own families, to plan when they were going to have children, whether they were going to have children, how many children they were going to have. She drew connections between reproductive rights and economic justice ... [whispers] Bernie Sanders.

Imani Gandy: She said that for example, it is easier for families to feed and house and clothe two children as opposed to eight or ten children, because by the time you hit that eighth or tenth children, the first two or three children had to go work in a sweatshop somewhere in order to support the family.

Imani Gandy: And she, having grown up as the ninth or tenth child in a huge family, understood those hardships, and spent a lot of time trying to convince anyone who would listen, that birth control was the jam.

Jessica Pieklo: So wait, I'm confused. Why the hell is Justice Thomas then talking about her at all?

Imani Gandy: Because of the overarching narrative that anti-choicers have developed about Margaret Sanger, that she was personally going into every Black neighborhood in America, and erecting abortion clinics, in an effort to exterminate the Black population.

Imani Gandy: This has been a narrative that has gone on, and on, and on, and it's exactly the narrative that drove me to write my piece, because I was tired of arguing with jackasses on Twitter who were coming at me with quotes that were not hers, with quotes that were taken out of context so much so that it changed the nature of the quote. And with memes of her talking to the KKK, clearly Photoshopped in because she doesn't have any goddamned legs in the photo.

Imani Gandy: You know what I mean? I was just tired of all of this shit. So I decided to write this piece. And Thomas, I'm telling you, his clerks read it, and wrote around it, in

a way that sort of acknowledged the things that I was saying in my piece, like no, she wasn't trying to exterminate Black people, no, the Negro project which she started in the South was not about exterminating Black people, but rather was about bringing birth control to Black women in the South, because a lot of the clinics in the South wouldn't serve Black women.

Imani Gandy: And Black women have always controlled their reproduction since the days of enslavement, because sometimes abortion or even infanticide is better than allowing your child to be ripped from your arms and enslaved. So, this idea that Margaret Sanger was trying to exterminate the Black population, I essentially debunked it.

Imani Gandy: But Clarence Thomas and the way that he writes his opinion, manages to get around my debunking, but still sort of insinuate that that's what she was doing. He insinuates that Margaret Sanger knew that birth control could lead to eugenics. The reason why she "knew that", is because she knew that there were, as she says, "anti-Negro people who wanted to use birth control in order to reduce the Black population."

Imani Gandy: And while she herself was not one of those anti-Negro people, she didn't mind talking to people who were. So, her fallibility was in her willingness to overlook the vicious nature of organizations like the KKK, and organizations like American Eugenics Society, which was basically all about trying to reduce people of "inferior stock", to make sure that people of "superior stock" were breeding.

Imani Gandy: And "superior stock" means essentially, wealthy, middle class to wealthy white women. It didn't include immigrants, it didn't include impoverished people, it didn't include criminals. And it didn't include the "feeble-minded", which was really, what Margaret Sanger was all about. She was really all about getting rid of the "morons, imbeciles, and idiots" out of the population.

Imani Gandy: And so, in that regard, she was so unreasonably, incredibly, hella ableist, that not only is it offensive to me as a Black person that people continue to try to use her as a pawn against Black women, as a sort of cudgel against us to criticize our support for Planned Parenthood, they absolutely ignore disabled people, and the way in which her rhetoric actually harmed them, and actually led to sterilization policies that were forced upon them.

Jessica Pieklo: Right. And we see Thomas do that in this opinion, right? I mean, this sort of mumbo jumbo that he pulls with Iceland, and talking about their Down's birthrate, right? All of it is about intentionally misleading this narrative on eugenics, and birth control.

Imani Gandy: Yeah. He talks about the way Iceland reduced their Down's birth to zero. With respect to sex selection, he talks about how in Asia there are 160 million "missing women", which doesn't make sense, because they're not women, they're fetuses. You know what I mean? But then again, here we are trying to

equate fetuses, and embryos, and blastocysts to people. Because now these abortions that people decided to have resulted in missing women.

Imani Gandy: So it's like, is he calling pregnant people who get abortions kidnappers now? I don't understand the level of rhetoric and the increased disingenuous nature of the rhetoric, in order to shame pregnant people for individual choices that they make, and to make those individual choices part of some nefarious eugenics plot that is being perpetrated on people. It's bizarre to me.

Jessica Pieklo: It's bizarre, and we've said it's dangerous, but I don't think we can underscore that enough. Because after he has done all of this intentionally misleading on the history of eugenics, and Margaret Sanger, and population, and abortion, he then goes right into modern day family planning, does not skip a beat. Goes, "Here's the history of all of this stuff, and oh, by the way, here's modern day family planning."

Jessica Pieklo: And so, what he does is suggest that that is a legitimate reason that the government could use to curtail contraception access. If modern day family planning is equivalent to the eugenics movement, then of course the government should step in and restrict that, otherwise it's promoting eugenics.

Imani Gandy: Exactly. And here's what he says specifically. I quote, "Today, notwithstanding Sanger's views on abortion," and listener ... Okay, I'm going to start this over, listener, because I think it's really important for you to understand. In his opinion, Clarence Thomas admits that Margaret Sanger opposed abortion.

Imani Gandy: And the reason why that's important is because you can go on any pro-life, "pro-life", or LifeSite News, or even go on Twitter into the "pro-life community" there, and they will be screaming about how Margaret Sanger was building clinics in Black neighborhoods, and supported abortion, and was performing abortion in the bathrooms of the Wendy's, if they had Wendy's back in 1930.

Imani Gandy: But that's not the case. Clarence Thomas actually gives me a little bit of ammo, because I can say to these people now, "Well Clarence Thomas already said that Margaret Sanger didn't support abortion, so shut your pie hole, man." But that was a little side note. Back to the quote.

Imani Gandy: So he says, "Today, notwithstanding Sanger's views on abortion, respondent Planned Parenthood promotes both birth control and abortion as 'reproductive health services.'" And I can feel the sarcastic quotes in there, right? Can you feel them?

Jessica Pieklo: Oh yeah, that's just dripping.

Imani Gandy: "As 'reproductive health services' that can be used for family planning." Yes, abortion and birth control are part of family planning. Why are you typing that like it's an evil nefarious thing?

Jessica Pieklo: It's like, power typing.

Imani Gandy: "Even though Sanger didn't like abortion, Planned Parenthood still offers birth control and abortion as part of family planning." It's like, what the fuck are you talking about, man? Ugh, Christ.

Jessica Pieklo: But again, in that same breath, family planning's eugenics, according to Clarence Thomas.

Imani Gandy: Yeah. Yeah. Yeah. So now that we've gone through all that, and you've allowed me to go on my Sanger rant, because I've had a Sanger rant in me that I needed to get out, what does this mean for other fetal remains and reason ban cases?

Jessica Pieklo: Oh no, it's good to transition, because we have big fights going on right now. We have one in Texas over their fetal remains requirements. Oral arguments in that case were scheduled for the week of June 10th, but those have now been extended with no new date currently set. I anticipate though attorneys defending Texas's ban will be very quick to cite this per curiam decision, and Thomas's concurrence, probably quote for it, if I'm the Texas attorney general. So we've got that.

Jessica Pieklo: We're waiting for a decision from the Eighth Circuit in an Arkansas challenge. They heard oral arguments in that case in January. So literally, we could get a decision any day. And also, I guarantee you, there are attorneys running up to the appeals court being like, "Hey judges, did you hear? Did you hear? This is what Thomas said."

Jessica Pieklo: But, we've got a new lawsuit challenging Minnesota fetal disposal requirements that was just filed in Minnesota State Court. So we've talked about on this show the difference between challenging some of these restrictions in federal court, and state court, and having maybe some more in state court given the current makeup of the federal court, thanks to all those Trump appointees.

Jessica Pieklo: So that Minnesota lawsuit makes different claims than the Indiana case did that we just talked about, and it's grounded in Minnesota law. So I'm excited about that one. I want to see where that's going to go.

Imani Gandy: It's like we said, a lot of this stuff is now going to be moving to the state courts, because the federal courts are fucked.

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: So essentially, just to sort of bring this all back to basics, Thomas's concurrence suggests that the Court would absolutely be willing to uphold a race, sex, disability ban, if given the opportunity. Is that correct?

Jessica Pieklo: Absolutely. Yeah. Basically the Court declined to address the merits of the reason ban, when it kept that part of the Seventh Circuit decision in place. And that was in part because there's no circuit split. And like we've talked about on this show before also, one of the times when the Supreme Court steps in, is when there's a circuit split. That's when one court of appeal says one thing about a law, and another says a different.

Jessica Pieklo: So right now, the federal courts are in agreement that those are unconstitutional pre-viability bans. However, there's always a however right now, right? It feels like we live in the however.

Imani Gandy: The upside down and the however.

Jessica Pieklo: There's the possibility that we could get a circuit split. So right now, we've got a case in the Sixth Circuit, similar ban out of Ohio, and oral arguments in that one also happened in January. So who knows when they'll rule, but I would anticipate soon.

Jessica Pieklo: There's another challenge running through federal courts to Kentucky's reason ban moving forward, and so again, if either one of those were to get upheld, then we have that magic circuit split, and you can guarantee that the antis will run right back to SCOTUS and say, "Here is that reason for you to step in now."

Imani Gandy: And then presumably, if antis win the "fetus is a person" fight that they're waging right now, then the argument would be that permitting characteristic-based abortion, in other words, allowing pregnant people to abort a particular pregnancy based on the characteristics of that fetus, that would have a disparate impact on those fetuses. I mean, that's what Thomas says. He makes this analogy between these reason bans and racial discrimination litigation.

Imani Gandy: And the idea behind disparate impact is that, let's say you're suing your employer for racial discrimination. Well, why would you be? You're white. Let's say I'm suing my employer-

Jessica Pieklo: Reverse discrimination, man! [laughing]

Imani Gandy: So let's say I'm suing my employer for racial discrimination. And so my employer says, "What are you talking about? We don't intend to discriminate against Black people. We love Black people. I have a Black best friend." And a court will say, "Well, it doesn't really matter what you intended if your policies have a disparate impact on Black people. That's enough to show racial discrimination."

Imani Gandy: So the argument that Thomas is making is that, it doesn't matter what the pregnant person intended when they terminated a particular pregnancy because that pregnancy was going to result in a child with Down syndrome. The fact of the matter is, is that terminating pregnancies due to a finding of Down

syndrome disparately impacts fetuses. That's a weird argument, right? That's a really strange argument.

Jessica Pieklo: Conservatives hate civil rights framing until all of a sudden they love it, right?

Imani Gandy: They do. Yeah. It's very strange, and it's bizarre.

Jessica Pieklo: Okay, so that's ... Thomas has a lot of bizarre stuff happening here. Like that substantive due process stuff, though that's not just him spouting off though, is it? We've got to talk about that a little bit.

Imani Gandy: Yeah, we actually do. So, the substantive due process stuff is actually a very, very big deal, because it's Thomas signaling that substantive due process, and that's stuff relating to sex, family, et cetera, those types of issues are on the ropes when it comes to the Supreme Court. And that means, not just abortion, but contraception, and marriage equality. And we can't just write this off as Thomas being some sort of fringe Justice who never speaks, and just sits there looking ornery. Because he is one of those people.

Imani Gandy: But during his confirmation hearing, Justice Brad McBeer was grilled by Senator Chris Coons from Delaware, on statements that ... I was going to say Kavanaugh, because that's his actual name. But Chris Coons ... I was like, "I can't say Kavanaugh. That's not his name. His name is Justice McBeer." But during his confirmation hearings, he was grilled by Chris Coons on statements that Kavanaugh had made questioning the validity of substantive due process.

Imani Gandy: And now, there's a lot of Conservatives who like to question the validity of substantive due process, precisely because of the family and sexual matters that substantive due process relates to. So it makes sense that Kavanaugh being Conservative would question that validity, right?

Jessica Pieklo: It would, except that that used to be like we said, the fringe position. But now that is absolutely in the fold. And Koons's questioning in the Kavanaugh hearings at this moment was really right on, and unfortunately, it was also one of those moments where you really needed a law degree to follow what was happening.

Jessica Pieklo: So he was talking about statements that Kavanaugh had made concerning a case by the name of Washington v. Glucksberg. And that's a 1997 Supreme Court decision which rejected a constitutional right to assisted suicide for the terminally ill, on substantive due process grounds. So Kavanaugh made these statements in a 2017 speech praising Chief Justice Rehnquist's dissents in Planned Parenthood v. Casey and Roe v. Wade. Both of those dissents rejected a constitutional right to abortion.

Jessica Pieklo: So Kavanaugh in particular praised Rehnquist's application of a standard limiting constitutionally protected liberties to only those that are "deeply rooted in the nation's history and tradition." So for folks like Thomas, Alito, Kavanaugh,

Gorsuch, and probably even Roberts, those rights don't extend to things like abortion, and probably not even to contraception.

Imani Gandy: So ...

Jessica Pieklo: So yeah, they're coming for your birth control.

Imani Gandy: They are coming. They are coming for your birth control. And we've been saying that for a long time. Unless you think still-

Jessica Pieklo: We need like a gong. Gong!

Imani Gandy: They're coming for your birth control! Lest you think we're being alarmist, let me just remind you that Griswold v. Connecticut was a 1965 case, that said that married couples had a right to use contraception. And it wasn't until 1972 in a case called Eisenstadt v. Baird, that the Court said, "We're going to go ahead and extend that right to contraception to unmarried people as well." So these are very wildly recent decisions.

Jessica Pieklo: If you are in your 40s, chances are you were alive at some point in time when it was legal to restrict contraception access and the Supreme Court was cool with it.

Imani Gandy: Yeah, and that's a scary thought. So there are people who have been patting those of us on the head who have been arguing about abortion rights, and saying that they're coming for abortion, and saying that they're coming for contraception, and "Oh, no, no, no dear. Don't worry your pretty head." They're coming for this stuff. They are. And the more you just, I don't know, recognize it, tell people, stack up on birth control pills. I don't know what to do. I don't know what to tell you.

Imani Gandy: But I do want to bring it back to the Ruth Bader Ginsburg note if I might for just a moment.

Jessica Pieklo: Let's close on the footnote fight of 2019, because I love it when justices fight.

Imani Gandy: So, Clarence Thomas tried to call out Ginsburg, because Ginsburg dissented from the opinion, and wrote a very, very short dissent. Thomas tried to call out Ginsburg, and he said, "Justice Ginsburg's dissent from this holding makes little sense." And he said some other stuff, blah, blah, blah. And then says that she, "adopts Chief Judge Woods' alternative suggestion that regulating the disposition of an aborted child's body might impose an undue burden on the mother's right to abort that already aborted child."

Jessica Pieklo: We're not aborting children. We're not aborting children.

Imani Gandy: Nobody's aborting children. And then here comes Ginsburg with the clapback. "Justice Thomas's footnote displays more heat than light." And then she says some other stuff about circuit splits. And then says, and here's the zinger, "A woman who exercises her constitutionally protected right to terminate a pregnancy is not a 'mother'. The cost of and trauma potentially induced by a post-procedure requirement may well constitute an undue burden."

Imani Gandy: Boom. She dropped the little frilly thing that she wears around her robe. She dropped that. And it didn't make a sound, but we all felt it, because goddamn.

Jessica Pieklo: It fluttered forcefully to the ground.

Imani Gandy: Exactly. So, we're going to leave you on that footnote from RBG, so as not to further depress you. But if you want to be depressed, or if you want to come to us for some light at the end of the tunnel, you can talk to me on Twitter. I'm @angryblacklady. You can talk to Jess on Twitter. She's @hegemommy. And you can talk to Rewire, or follow Rewire.News, @rewire_news. You can talk to Rewire too, because the woman who manages the Rewire account is very nice. She's a very lovely lady.

Jessica Pieklo: Yeah.

Imani Gandy: And aside from that, we're going to ahead and see you on the tubes.

Jessica Pieklo: See you on the tubes.

Jessica Pieklo: 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.