Roe v. Wade

Oral Reargument - October 11, 1972

Warren E. Burger

We'll hear arguments first in number 70-18, Roe against Wade.

Mrs. Weddington, you may proceed whenever you're ready.

Sarah R. Weddington

Mr. Chief Justice and may it please the Court.

We are once again before this Court to ask relief against the continued enforcement of the Texas abortion statute and ask that you affirm the ruling of the three-judge Court

below which held our statute unconstitutional for two reasons, the first, that it was vague and, the second, that it interfered with the Ninth Amendment right for a woman to determine whether or not she would continue or terminate her pregnancy.

As you will recall, there are three-- four-- three plaintiffs and one intervener involved here.

The first plaintiff was Jane Roe, an unmarried pregnant girl who had sought an abortion in the State of Texas and was denied it because of the Texas abortion statute which provides an abortion is lawful only for the purpose of saving the life of the woman.

In the original action, she was joined by a married couple, John and Mary Doe.

Mrs. Doe had a medical condition.

Her doctor had recommended first that she not get pregnant and, second, that she not take the pill.

After this cause was instituted and after, in fact, the three-judge Court had been granted, those three plaintiffs were joined by an intervener, Doctor Hallford, who was, at the time he intervened, under a pending state criminal prosecution under the statute.

He did not ask that his prosecution be joined-- be stopped by the Court but, rather, joined in the original request for a declaratory judgment and injunctive relief against future prosecutions.

As a matter of fact, he has not-- his prosecution has not been continued, but the

District Attorney, against whom we filed a suit, has taken a position that because there was no injunction he is still free to institute prosecutions.

There is a letter from his office in the appendix stating that he will continue prosecutions and, in fact, there had been a very limited number of prosecutions instituted in the State of Texas since the three-judge Court entered its declaratory judgment.

Warren E. Burger

The prosecutions of doctors, you're speaking of.

Sarah R. Weddington

Prosecutions of doctors, yes, sir.

The problem that we face in Texas is that even though we were granted a declaratory judgment ruling the law unconstitutional and even though we've been before this Court once in the past, in Texas, women still are not able to receive abortions from licensed doctors because doctors still fear that they will be prosecuted under the statute.

So, if the declaratory judgment was any relief at all, it was an almost meaningful relief because the women of Texas still must either travel to other states, if they are that sophisticated and can afford it, or they must resort to some other less-- some other very undesirable alternatives and--

Warren E. Burger

You said "meaningful." You meant meaningless, didn't you?

Sarah R. Weddington

Yes, it's just--

Warren E. Burger

Meaningless review.

Sarah R. Weddington

In fact, we've pointed out in our supplemental brief filed here that there had been something like 1,600 Texas women who have gone to New York City alone for abortions in the first nine months of 1971.

In addition, I think the Court would recognize there are many otherwomen going to other parts of the country.

One of the objections that our opponents have raised is saying that this Court is moot because, of course, the woman is no longer pregnant.

It's been almost three years since we instituted the original action and, yet, we can certainly show that it is a continuing problem to Texas women.

There still are unwanted pregnancies. There are still women who, for various reasons, do not wish to continue the pregnancy whether because of personal health considerations, whether because of their family situation, whether because of financial situations, education, working situations, some of the many things we discussed at the last hearing.

Since the last hearing before this Court, there have been a few cases decided that we wanted

to draw the Court's attention to and are covered in our supplemental brief.

In addition, there is a supplemental brief filed by an amicus party, Harriet Pilpel on behalf of Planned Parenthood of New York, that seeks to point out to the Court at pages 6 and 7, subsequent pages, some of the changing medical statistics available regarding the procedure of abortion.

For example, that brief points out that the overall maternal death rate from legal abortion in New York dropped to 3.7 per 100,000 abortions in the last half of 1971 and that, in fact, is less than half of the death rate associated with live delivery for women.

That, in fact, the maternal morbidity--mortality rate has decreased by about two-thirds to a record low in New York in 1971.

That-- now, in 1971, New York recorded the lowest infant mortality rate ever in that state.

That during the first 18 months of 19-- well, from July 1, 1970 to December 31, 1971, out of wedlock pregnancies have dropped about 14%.

We now have other statistics coming from California and other states that show that not only has the overall birthrate declined, but the welfare birthrate has also declined accordingly.

As to the women, this is their only forum.

They are in a very unique situation for several reasons.

First, because of the very nature of the interest involved, their primary interest being the interest associated with the question of

whether or not they will be forced by the state to continue an unwanted pregnancy.

In our original brief, we alleged a number of constitutional grounds.

The main one that we are relying on before this Court are the Fifth, Ninth, and the Fourteenth Amendments.

There's a great body of precedent.

Certainly, we cannot say that there isn't a constitution so stated the right to an abortion but, neither is there stated the right to travel or some of the other basic rights that this Court have held are under the United States Constitution.

The Court has in the past, for example, held that it is the right of the parents and of the individual to determine whether or not they

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

Griswold, of course, is the primary case holding that the state could not interfere in the question of whether or not a married couple would use birth control and, since then, the Courts have-- this Court, of course, has held that the individual has the right to

determine whether they are married or single, whether they would use birth control.

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

One of the cases decided since our last argument, December 13, was the second Connecticut case, Abele versus Markle, which Judge-- excuse me?

Warren E. Burger

Newman.

Sarah R. Weddington

Judge Newman wrote the opinion, yes.

Thank you.

And, Judge Lambert concurred.

Part of the lang-- in that case, that three-judge Court held the Connecticut statute, a slightly revised statute for the second time, to be unconstitutional, and part of the language of that case pointed out that "no decision of the Supreme Court has ever permitted anyone's constitutional right to be directly abridged to protect a state interest which is subject to such a variety of personal judgments" and, certainly, the amicus brief stag before the Court showed the variety of personal judgments that come to bear on this particular situation.

To oppose such a statute, the Court said, would be to permit the state to impose its view of the nature of a fetus upon those who have the constitutional right to base an important decision in their personal lives upon a different view.

Again, this is a very special type case for the women because of the very nature of the injury involved.

It is an irreparable injury.

Once pregnancy has started, certainly this is not the kind of injury that can be later adjudicated.

It is not the kind of injury that can later be compensated by some sort of monetary reward.

These women who have now gone through pregnancy and the women who continue to be forced to go through pregnancy have certainly gone through something that is irreparable, that can never be changed for them.

It is certainly great and it is certainly immediate.

There is no other forum available to them.

As we talked last time, they are not subject in Texas to any kind of criminal prosecution whether the woman performs self-abortion, whether she goes to a doctor, finds someone who will perform it on her.

She is guilty of no crime whatsoever and, yet, the state tries to allege that its purpose in the statute was to protect the fetus.

If that's true, the fact the woman is guilty of no crime is not a reasonable kind of-- it does not reasonably follow.

The women are not able to have any kind of declaratory judgment in Texas because of our special declaratory judgment statutes and our concurring Criminal and Civil Courts, the two different lines of cases that we have.

So, the Federal Court was the only Court to which the women had any kind of access, and it was to the Federal Courts they came, and it's the Federal Court, in my judgment, that should determine this case.

It's a very unique kind of harm, certainly, that was done to them.

Even though there are many cases, some very recent from this Court, talking about the

problem of when a state may interfere when they're-- or the federal judiciary may interfere when there is a pending state criminal prosecution.

This case does come under the exceptions in that there is great, immediate, irreparable injury where there is no other forum.

It is something that, as far as these women are concerned, can never be adjudicated in a criminal prosecution, much less in a single criminal prosecution.

It certainly is an instance of a situation that is capable of repetition, yet, evading review.

The judiciary simply does not move fast enough for the case to be decided within the period of gestation, much less within the

period within which an abortion would be medically safe for these women.

The state has alleged and it's only alleged interest in the 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.

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 in the statute in 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?

Potter Stewart

Regardless of the purpose for which the statute was originally enacted or the purpose which keeps it on the books in Texas today, you would agree, I suppose, that one of the important factors that has to be considered in this case is what rights, if any, does the unborn fetus have.

Sarah R. Weddington

That's correct.

There had been two cases decided since the December 13 argument that expressly hold that a fetus has no constitutional rights, one being Byrn versus New York, and the other being the Magee-Womens Hospital cases.

In both situations, a person sought to bring that very question to the Court: does a fetus -- in the one instance, Byrn, was a challenge to the New York revised statute, the other was a situation where a person sought to prevent Magee-Womens Hospital from allowing further abortions to be done in that hospital.

And, in both cases, it was held that the fetus had no constitutional rights.

Several of the briefs before this Court would also argue that this Court in deciding the Vuitch case which has allowed abortions to continue in the District of Columbia, certainly the Court would not have made that kind of decision if it felt there were any ingrained rights of the fetus within the constitution.

There had also-- there is also, of course--

Byron R. White

Is it critical to your case that the fetus not to be a person under the due process clause?

Sarah R. Weddington

It seems to me that it is critical first that we prove this is a fundamental interest on behalf of the woman, that it is a constitutional right and, second--

Byron R. White

Yes, but how about the fetus?

Sarah R. Weddington

Okay and, second, that the state has no compelling state interest.

Okay, and the state is alleging a compelling state interest.

Byron R. White

Yes, but I'm just asking you, under the federal constitution, is the fetus a person for the purpose of the protection of the Due Process Clause?

Sarah R. Weddington

All of the cases, the prior history of this statute, the common law history would

indicate that it is not.

The state has shown no--

Byron R. White

Well, what if-- would you lose your case if the fetus was a person?

Sarah R. Weddington

Then you would have a balancing of interests.

Byron R. White

Well, you'd still-- you have any way, don't you?

Sarah R. Weddington

Excuse me?

Byron R. White

You have any way, don't you?

You're going to be balancing the rights of the mother against the rights of the fetus.

Sarah R. Weddington

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

Byron R. White

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

Sarah R. Weddington

I think-- it would seem to me that--

Byron R. White

So all the talk of compelling state interests is beside the point.

It can never be compelling enough.

Sarah R. Weddington

If the state could show that the fetus was a person under the Fourteenth Amendment or under some other amendment or part of the constitution, then you would have the situation of trying-- you would have a state compelling interest which, in some instances, can outweigh a fundamental right.

This is not the case in this particular situation.

Warren E. Burger

Do you make any distinction between the first month and the ninth month of gestation?

Sarah R. Weddington

Our statute does not.

Warren E. Burger

Do you, in your position in this case?

Sarah R. Weddington

We are asking in this case that the Court declare the statute unconstitutional, the state having proved no compelling interest at all.

There are some states that now have adopted time limits.

Those have not yet been challenged and, perhaps, that question will be before this Court.

Even those statutes though allow exceptions, well, for-- New York, for example, says an abortion is lawful up to 24 weeks, but even after the 24 weeks it is still lawful where there

is rape or incest, where the mother's mental or physical health is involved.

In other words, even after that period, it's not a hard and fast cutoff.

Warren E. Burger

Then it's the weighing process that Mr. Justice White was referring to.

Is that your position?

Sarah R. Weddington

The legislature and in that situation engaged in the weighing process, and it seems to me that it has not yet been determined whether the state has the compelling state interest to uphold even that kind of regulation, but that's really not before the Court in this particular case. We have no time limit.

There is no indication in Texas that any would be applied in any future date.

You know, we just don't know that.

Harry A. Blackmun

Mrs. Weddington, you're attacking the statute on two grounds, are you not?

Sarah R. Weddington

That's correct.

Harry A. Blackmun

Both vagueness and the Ninth Amendment.

Do you place any greater weight on one argument as against the other?

Sarah R. Weddington

Our--Texas Court of Criminal Appeals in Thompson versus State--

Harry A. Blackmun

That's the recent case?

Sarah R. Weddington

Yes, in November or last--

Harry A. Blackmun

Again up on vagueness.

Sarah R. Weddington

Yes, it-- that particular case held that the Texas statute was not vague citing Vuitch.

It's my opinion that that reliance was misplaced.

That, in Vuitch, this Court had before it the D.C. statute which allowed abortion for the purpose of saving the life or the health, and this Court adopted the interpretation that

health meant both mental and physical health.

And, it seemed to me, the Court's language in that case talked a great deal about the fact that the doctor's judgment goes to saving the health of the woman, that that's the kind of judgment that he is used to making.

In Texas, that's not the judgment he is forced to make.

The judgment in Texas is, "Is this necessary for the purpose of preserving the life of the woman?", and the language of that statute has never been interpreted.

That's not the kind of judgment that a doctor is accustomed or perhaps even able to make.

Harry A. Blackmun

I'll go back to my question.

Are you--

Sarah R. Weddington

I still continue the argument that the Texas case is vague.

Harry A. Blackmun

So, you're relying on both.

Sarah R. Weddington

Yes, Your Honor, we are.

Harry A. Blackmun

You referred a little bit to history.

Let me ask you a question based on history.

Sarah R. Weddington

Okay.

Harry A. Blackmun

You're familiar with a Hippocratic Oath?

Sarah R. Weddington

I am.

Harry A. Blackmun

I think I may have missed it, but I find no reference to it in this-- in your brief or in the luminous briefs that were overwhelmed with here.

You have any comment about the Hippocratic Oath?

Sarah R. Weddington

I think two things could be said.

The first would be that situations and understandings change.

In this case, for example, we have before the Court a medical amicus brief that was joined by all of the deans of the public medical schools in Texas.

It was joined by numerous other professors of medicine.

It was joined by the American College of Obstetricians and Gynecologists.

You know--

Harry A. Blackmun

There are other briefs in the other side joined by equally outstanding positions.

Sarah R. Weddington

None of theirs is--

Harry A. Blackmun

But tell me why you didn't discuss the Hippocratic Oath.

Sarah R. Weddington

Okay.

I guess it was-- okay, in part, because the Hippocratic Oath, we discuss basically the constitutional protection we felt the woman to have.

The Hippocratic Oath does not pertain to that.

Second, we discuss the fact that the state had not established a compelling state interest.

The Hippocratic Oath would not really pertain to that.

And then, we discuss the vagueness jurisdiction.

It seemed to us that that-- that the fact that the medical profession, at one time, had adopted the Hippocratic Oath does not weigh upon the fundamental constitutional rights involved.

It is a guide for physicians, but the outstanding organizations of the medical profession have, in fact, adopted a position that says the doctor and the patient should be able to make the decision for themselves in this kind of situation.

Harry A. Blackmun

Of course, it's the only definitive statement of ethics in the medical profession.

I take it, from what you just said, that you're-- you didn't even footnote it because it's old.

That's about really what you're saying.

Sarah R. Weddington

Well, I guess you-- it is old, and not that it's out of date, but it seemed to us that it was not pertinent to the argument we were making.

Harry A. Blackmun

Let me ask another question.

Last June 29, this Court decided the capital punishment cases.

Sarah R. Weddington

Yes, sir.

Harry A. Blackmun

Do you feel that there is any inconsistency in the Court's decision in those cases outlying the death penalty with respect to convicted murderers and rapists at one end of lifespan,

and your position in this case at the other end of lifespan?

Sarah R. Weddington

I think had there been established that the fetus was a person under the Fourteenth Amendment or under constitutional protection then there might be a differentiation.

In this case, there has never been established that the fetus is a person or that it's entitled to the Fourteenth Amendment rights or the protection of the constitution.

It would be inconsistent to decide that, after birth, various classifications of persons would be subject to the death penalty or not but, here, we have a person, the woman, entitled to fundamental constitutional rights as opposed

to the fetus prior to birth where there is no establishment of any kind of federal constitutional rights.

Harry A. Blackmun

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

Sarah R. Weddington

It depends on saying that the woman has a fundament constitutional right and that the state has not proved any compelling interest for regulation in the area.

Even if the Court, at some point, determined the fetus to be entitled to constitutional protection, you would still get back into the weighing of one life against another.

Byron R. White

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

Sarah R. Weddington

No, Your Honor.

I said that would be what would be involved if the facts were different and the state could prove that there was a person for the constitutional right.

Potter Stewart

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

Sarah R. Weddington

I would have a very difficult case. [Laughter]

Potter Stewart

You certainly would because you'd have the same kind of thing you'd have to say that this would be the equivalent to after the child was born.

Sarah R. Weddington

That's right.

Potter Stewart

If the mother thought that it bothered her health having the child around, she could have it killed.

Isn't that correct?

Sarah R. Weddington

That's correct.

Warren E. Burger

Could Texas constitutionally-- did you want to respond further to Justice Stewart?

Did you want to respond further to him?

Sarah R. Weddington

No, Your Honor.

Warren E. Burger

Could Texas constitutionally, in your view, declare that—by statute that the fetus is a person for all constitutional purposes after the third month of gestation?

Sarah R. Weddington

I do not believe that the state legislature can determine the meaning of the federal constitution.

It is up to this Court to make that determination.

Warren E. Burger

Yes, but states have to--

Sarah R. Weddington

The state--

Warren E. Burger

Go against the statutes, don't they?

Sarah R. Weddington

The state could obviously adopt that kind of statute and then the question would have to be adjudicated as to whether, for all purposes, that statute is constitutional.

We are not alleging that there cannot be some kind of protection.

For example, the property rights which, again, are contingent on being—upon being born alive that can be retroactive to the period prior to birth, but in this particular situation, we are alleging that this statute is unconstitutional.

Warren E. Burger

They have been recognized in the period before birth for purposes of injury claims.

You put that, I take it, in the property category?

Sarah R. Weddington

In Texas that is only when they are born alive, and the fact that there is a wrong—the wrongful conduct of another is not the same in this situation.

As to property rights, for example, there are even property rights that relate back to prior to conception, children that are not yet conceived can later inherit.

But, that doesn't—that did not prevent this Court in Griswold from holding people had the right to birth control.

Warren E. Burger

Mr. Flowers.

Robert C. Flowers

Mr. Chief Justice and may it please the Court.

The lower Court in Dallas has held the Texas abortion law unconstitutional primarily on the two grounds that had just been discussed, on

the vagueness question and the rights of the mother under the Ninth Amendment.

The thrust of the whole argument of the State of Texas is against the rights of the mother under the Ninth Amendment, that it certainly is a balancing effect.

There must be or, on the other side of the coin, Texas has no stake.

It is impossible for me to trace within my allocated time the development of the fetus from the date of conception to the date of its birth, but it is the position of the State of Texas that upon conception we have a human baby, a person within the concept of the Constitution of the United States and that of Texas also.

Potter Stewart

How should we-- how should that question be decided?

Is it a legal question, a constitutional question, a medical question, a philosophical question, a religious question, what is it?

Robert C. Flowers

Your Honor, we feel that it could be best decided by a legislature in view of the fact that they can bring before it, in medical testimony, the actual people to do the research, but we do have--

Potter Stewart

You think that it's basically a medical question?

Robert C. Flowers

From a constitutional stand point, no, sir.

I think it's fairly squarely before this Court.

We don't envy the Court for having to make this decision.

Potter Stewart

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

Robert C. Flowers

No, sir.

We can only go back to what the framers of our constitution had in mind.

Potter Stewart

Well, these weren't the framers who wrote the Fourteenth Amendment that came along.

Robert C. Flowers

No, sir.

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

Potter Stewart

Yes, but then the Fourteenth Amendment defines "person" and it defines "person" as somebody who is born, doesn't it?

Robert C. Flowers

I'm not sure about that, Your Honor.

Potter Stewart

I know it does.

Any person born or naturalized in the United States doesn't-- oh, that's not a definition of a

person, but that's a definition of a citizen.

Robert C. Flowers

Your Honor, it's our position that your definition of a person is so basic.

It's so fundamental that it is-- the framers of the constitution had not even set out to define.

We can only go to what the teachings at the time that the constitution was framed.

We have numerous listings in the brief by Mr. Joe Witherspoon, a professor at the University of Texas, that tries to trace back what was in their mind when they had the person concept when they drew up the constitution.

He quoted Blackstone in 1765 and he observed in his commentaries that life, "this right is

inherent by nature in every individual and exists even before the child is born."

I submit to you that the Declaration of Independence, we hold, is--

Harry A. Blackmun

When you quote Blackstone, is it not true that in Blackstone's time abortion was not a felony?

Robert C. Flowers

That's true, Your Honor, but what my point there was to see the thinking of the framers of the constitution from the people they've learned from and the general attitude of the time.

Harry A. Blackmun

Well, I think-- I'm just wondering if there's a basic consistency there and let me go back to something else that you said.

Is it not true or is it true that the medical profession itself is not in agreement as to when life begins?

Robert C. Flowers

I think that's true, sir.

But from a layman's stand point, medically speaking, we would say that at the moment of conception from the chromosomes, every potential that anybody in this room has is present from the moment of conception.

Harry A. Blackmun

Then you're speaking of potential of life.

Robert C. Flowers

Yes, sir.

Harry A. Blackmun

With which everyone can agree perhaps.

Robert C. Flowers

On the 7th day, I think that the heart, in some form, starts beating.

On the 20th day, practically all the facilities are there that you and I have, Your Honor.

I think--

Byron R. White

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

Robert C. Flowers

Yes, sir.

Byron R. White

In any circumstance.

Robert C. Flowers

It would, yes, sir.

Byron R. White

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

Robert C. Flowers

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

Byron R. White

What would you choose?

Would you choose to kill the innocent one or what?

Robert C. Flowers

Well, in this-- in our statutes, the state did choose that way, Your Honor.

Well, in the protection of the mother.

Thurgood Marshall

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

Robert C. Flowers

I'm sorry, I didn't understand.

Thurgood Marshall

Could Texas say, if it comes to a situation for the benefit and the health of the wife that the

husband has to die, could they kill him?

Robert C. Flowers

I wouldn’t think so.

Thurgood Marshall

That’s right.

Robert C. Flowers

I wouldn't think so.

Thurgood Marshall

Is there any statute in Texas that prohibits doctors from performing any operation other than an abortion?

Robert C. Flowers

I don’t think so, sir, and there is another thrust of our argument.

If we declare, as the appellees in this case have asked this Court to declare, that an embryo or a fetus is a mass of protoplasm similar to a tumor then, of course, the state has no compelling interest whatsoever.

Thurgood Marshall

But there is no -- the only operation that a doctor can possibly commit that will bring on the criminal penalty is the abortion.

Robert C. Flowers

Yes, sir.

Thurgood Marshall

Why?

Robert C. Flowers

As far as--

Thurgood Marshall

Well, why don't you limit some other operation?

Robert C. Flowers

Because this is the only type of operation that would take another human life.

Thurgood Marshall

Well, a brain operation could.

Robert C. Flowers

Well, there again, that would be -- I think in every feat that a doctor performs, that he is constantly making this judgment.

Thurgood Marshall

If a doctor performs a brain operation and does it improperly, he could be guilty of

manslaughter, couldn't he?

Robert C. Flowers

I would think so, if he was negligent.

Thurgood Marshall

Well, why couldn't you charge him with manslaughter if he commits an abortion?

Robert C. Flowers

In effect, Your Honor, we did.

In the statute 1195 that has been very carefully avoided all thoughout these proceedings, it is not attacked.

It is unconstitutional for some reason.

If you'll permit me to--

Thurgood Marshall

Well, is it initiated?

Robert C. Flowers

No, sir.

You asked the question about whether we had made manslaughter-- abortion manslaughter.

Thurgood Marshall

Maybe the reason is why have two statutes?

Robert C. Flowers

Well, this was in context with-- this is 1195.

They are attacking 1191 and 1196, but omitted 1195.

Here's what 1195 said-- provides, whoever shall, during the parturition of the mother, destroy the vitality or life in a child in a state of

being born before actual birth and before actually birth which child would have otherwise been born alive which be-- shall be confined in the penitentiary for life or not less than five years.

Thurgood Marshall

What does that statute mean?

Robert C. Flowers

Sir?

Thurgood Marshall

What does it mean?

Robert C. Flowers

I would think that it--

Potter Stewart

It's an offense to kill a child in the process of childbirth.

Robert C. Flowers

Yes.

Potter Stewart

Isn't it?

Robert C. Flowers

It would be immediately before childbirth or right in the proximity of the child being born.

Thurgood Marshall

Which, is not an abortion.

Robert C. Flowers

Which is not-- would not be an abortion, yes, you're correct.

It would be homicide.

And we feel that the concept of fetus being in the-- within the concept of a person within the framework of the United States Constitution and the Texas Constitution is an extremely fundamental thing.

Potter Stewart

Of course, if you're right about that, you can sit down.

You've won your case.

Robert C. Flowers

Your Honor--

Potter Stewart

An acceptance of ours may be the Texas abortion law presently goes too far in allowing

abortion.

Robert C. Flowers

Yes, sir.

That's exactly right.

We feel that this is the only question really that this Court has to answer.

We have--

Byron R. White

Do you think the case is over for you?

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

Robert C. Flowers

Yes, sir.

I would say so.

Byron R. White

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

Robert C. Flowers

Oh, we have other interests, Your Honor, preventing promiscuity, maybe that's--

Byron R. White

Yes, but your legislature apparently or you're asserting that the state-- that your state law wants to protect the life of the fetus.

Robert C. Flowers

Yes, sir.

Byron R. White

And under state law, there is some rights given-- there are some rights given to the

fetus.

Robert C. Flowers

Yes, sir.

Byron R. White

And you're asserting those rights against the right of the mother.

Robert C. Flowers

Balancing against the Ninth Amendment rights or within the--

Byron R. White

Yes, 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 C. Flowers

Yes, sir.

Warren E. Burger

Does Texas have judicial statutes on mutilation --

Robert C. Flowers

Yes, sir.

Warren E. Burger

I guess in the Criminal Act?

Robert C. Flowers

Yes, sir.

Warren E. Burger

So that if there are, there are--

Robert C. Flowers

Yes, sir.

Warren E. Burger

Certain procedures which could be criminal.

Robert C. Flowers

That's right, they do--

Warren E. Burger

The man walked into the doctor's office and said I want you to cutoff my right arm--

Robert C. Flowers

That's right, mutilating and castration.

Warren E. Burger

Because it has offended me.

Robert C. Flowers

Yes, sir, I have forgotten about those, Your Honor.

Thurgood Marshall

Does that apply to doctors?

Robert C. Flowers

I would assume so, sir.

Anyone with--

Thurgood Marshall

Do you have any case that says so?

Robert C. Flowers

No, sir.

I would say that there would have to be a capability of mind to prove the merits in most criminal cases.

Your Honor, I'd like to call the attention of the Court that the unborn child, if this Court has not been blind to the rights of the unborn child in the past, in the Memorial case versus Anderson, a New Jersey Supreme Court case, the Court-- this was a case where the pregnant woman had refused on religious grounds not doing a blood transfusion and in order to save the child, the Court held that the right of the child to live and to be born was paramount over this pregnant woman's right of religion.

I think that here is exactly what we're facing in this case.

Is the life of this unborn fetus paramount over a woman's right to determine whether or not she shall bear a child?

In Glickman v. Cosgrove, it's a New Jersey Supreme Court case.

It's a tort action instituted against the doctor as a result of his failure to warn the mother that she was suffering from German measles in order that she could terminate her pregnancy.

The Court recognized the life of the embryo and stated that it would've been easier for the mother and less expensive for the father.

This alleged detriment cannot stand against the contention that it's still one single life.

In Jones versus State-- excuse me, Jones versus Jones, a New York Supreme Court held that the unborn child was a patient-- the mother's obstetrician as well as the mother herself-- excuse me a minute.

In Jackson versus Indiana, this Court zealously guarded the rights of a retarded child.

Now, if we are going to extend the right of a child who has reached its potential, it cannot go on and grow.

It cannot go on and grow mentally and achieve, then how much more right should we afford to a child who is -- has all of the potential of achieving?

The Prince versus Commonwealth of Massachusetts case, this Court was faced with the contention that the state statute precluding labor by child in tender years in distributing religious tracks was protected, that the child's right to grow up and to become educated and fully developed was paramount to these parents' religious beliefs.

This Court has been diligent in protecting the rights of the minorities and, Gentlemen, we say that this is a minority, a silent minority, the true silent minority.

Who is speaking for these children?

Where is the council for these unborn children, whose life is being taken?

Where is the safeguard of the right to trial by jury?

Are we to place this power in the hands of a mother, in a doctor?

All of the constitutional rights, if this person has the person concept, what would keep a legislature under this grounds from deciding who else might or might not be a human being, or might not be a person?

Potter Stewart

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

Robert C. Flowers

Yes, sir.

Potter Stewart

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

Robert C. Flowers

Your Honor, it seems to me that the physical act of being born, and I'm not playing it down, I know it's a very momentous incident but what changes?

Is it a non-human in changing by the act of birth into a human or--

Potter Stewart

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

Robert C. Flowers

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

Your Honor--

Potter Stewart

That's the reason I asked you at the beginning.

What-- within what framework should this question be decided?

Should it be a theological one, a philosophical one, or a medical one, or are we confined here to dealing with--

Robert C. Flowers

I think, Your Honor, that the Court--

Potter Stewart

The constitutional meaning of it?

Robert C. Flowers

I wish I could answer that.

I believe that the Court must take these-- the medical research and apply it to our constitution the best it can.

I said I'm without envy of the burden that the Court has.

I think that, possibly, we have an opportunity to make one of the worst mistakes here that we've ever made on--

Thurgood Marshall

There's no medical testimony--

Robert C. Flowers

Sorry.

Thurgood Marshall

That backs up your statement that it goes from inception, is there?

Robert C. Flowers

Only that--

Thurgood Marshall

Medical?

Robert C. Flowers

Sir, in this case you're talking about?

Thurgood Marshall

No, is there any medical testimony of any kind that says that a fetus is a person at the time of inception?

Robert C. Flowers

Your Honor, I would like to call the Court's attention in answering that question what I feel to believe one of the better culminations of the medical research, and that was Senior Judge's Campbell's dissenting opinion in the Doe versus Scott which is very similar to the case we have before us.

He goes in chronological order:

What the medical research has determined from the chromosome structure at the time of conception, what the potential is, down through each day of life until it's born.

Thurgood Marshall

But I understood you to say the State of Texas says it extends from the date of inception until the child is born.

Robert C. Flowers

The date of conception until the day-- yes, sir.

Thurgood Marshall

And that's it.

Robert C. Flowers

Yes, sir.

Thurgood Marshall

Now, you're not quoting a judge.

I want you to give me a medical recognizable medical writing of any kind that says that at the time of conception that the fetus is a person.

Robert C. Flowers

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

I'm not sure that I can give it to you after research--

William H. Rehnquist

Mr. Flowers.

Did Judge Campbell rely on medical authorities in that statement you're summarizing?

Robert C. Flowers

Yes, sir, he did.

This case was-- the Court held there that, really, the problem could be answered on an extension of the Griswold case and here's what my dissenting judge had to say about that which we adopt, Your Honor.

He said that "in citing Griswold, the majority concludes we could not distinguish the interest asserted by the plaintiffs in this case from those asserted in Griswold.

In other words, in their views, there is no distinction that can be made between prohibiting the use of contraceptives and prohibiting the destruction of fetal life which, as explained above, may reasonably be construed to be a human life.

I find this assertion incredible.

Contraceptive prevents creation of new life.

Abortion destroys existing life.

Abortion-- contraceptives and abortion are as distinguishable as thoughts and dreams are distinguishable from a reality."

Now--

Thurgood Marshall

Well, where are the medical part, as you told Mr. Justice Rehnquist, he cited, are they there?

Robert C. Flowers

Yes, sir.

He list them day by day, just prior to this time, sir.

But, it's quite lengthy.

Thurgood Marshall

Where is that you're reading from?

Robert C. Flowers

It's 321 Federal Supplement on page 394, sir.

And, I-- or 392, it begins, Your Honor, and I refer you to his medical condensation because I read most of the comments that he has to make through that-- these many, many briefs that we have had submitted in this case and other cases.

For instance, he starts off-- we did-- see, as Illinois legislature would have before us, the following undisputed facts relating to fetal life, seven weeks after conception, the fertilized egg develops into a well proportioned small-scaled baby and then goes from there on.

Now-- no, he doesn't address himself, Your Honor, to the moment of conception.

Thurgood Marshall

I didn't think so.

Robert C. Flowers

You're entirely right there and-- but I find no way that I know that any Court or any legislature or any doctor anywhere can say that here is the dividing line.

Here is not a life and here is a life after conception.

Perhaps it would be better left to our legislators.

There, they have the facilities to have some type of medical history brought before them,

and the opinion of the people who are being governed by this.

Potter Stewart

If you're right that an unborn is a person, then you can't leave it to the legislature to play fast and loose without dealing with that person.

In other words, if you're correct in your basic submission that an unborn fetus is a person, then abortion law such as that which New York has is grossly unconstitutional, isn't it?

Robert C. Flowers

That's right.

Yes, sir.

Potter Stewart

Allowing the killing of people.

Robert C. Flowers

Yes, sir.

Potter Stewart

Of persons.

Robert C. Flowers

Your Honor, the Massachusetts, I might point out--

Potter Stewart

So you can't leave this up to the legislature.

There's a constitutional problem, isn't there?

Robert C. Flowers

Well, if there would be exceptions within this--

Potter Stewart

And the basic constitutional question initially is whether or not an unborn fetus is a person, isn't it?

Robert C. Flowers

Yes, and entirely to the constitutional perspective.

Potter Stewart

It's critical to this case, is it not?

Robert C. Flowers

Yes, sir, it is, and we feel that the treatment that the Courts have given unborn children and dissent in distribution of property rights and tort laws have all pointed out that they have, in the past, have given credence to this concept.

William H. Rehnquist

Mr. Flowers, doesn't the fact that so many of the state abortion statutes do provide for exceptional situations in which abortion may be performed and presumably these date back a great number of years, following Mr. Justice Stewart's comment, suggest that the absolute proposition that a fetus from the time of conception is a person just is at least against the weight of historical legal approach to the question?

Robert C. Flowers

Yes, sir.

I would think possibly that that would indicate that.

However, Your Honor, in this whole field of abortion here we have, on the one hand, a

great clamoring for this liberization of it.

Perhaps this is good.

Population explosion, we have so many things that are arriving on the scene in the past few years that might have some effect on producing this type of legislature rather than facing the facts squarely.

I don't think anyone has faced the fact in making the decision whether this is a life in a person concept.

Thank you, Your Honor.

Harry A. Blackmun

Mr. Flowers, when was the first abortion statute adopted in your state?

Robert C. Flowers

Your Honor, in 1854.

Harry A. Blackmun

Prior to 1854, what was the situation in Texas?

Robert C. Flowers

I do not think it was an offense, Your Honor.

Harry A. Blackmun

So, in your--

Robert C. Flowers

I think it was silent.

The state was silent then.

Harry A. Blackmun

So, in your theory, destruction of a person in the form of a fetus was legal.

Robert C. Flowers

Yes, sir.

Well, at least legislature hadn't spoken on it, Your Honor.

Harry A. Blackmun

Well, it was legal.

Robert C. Flowers

Yes, sir.

William H. Rehnquist

Mr. Flowers, did Texas have an abortion statute on the books at the time, at least in the eyes of the North, it was readmitted to the union after the Civil War?

Robert C. Flowers

No, sir.

The State was admitted to the union in 1845, Your Honor, and--

William H. Rehnquist

Well, at the time that it was passed muster with--

Robert C. Flowers

When it was a republic?

William H. Rehnquist

Well, my historical question is that, following the Civil War, Congress went through the procedure, at any rate, of readmitting the states which have seceded and passing on their constitutional provisions in that certainly.

Did Texas have an abortion statute at that time?

Robert C. Flowers

Yes, sir.

It was passed in 1854, Your Honor.

Harry A. Blackmun

Do you know as a matter of historical fact when most of these abortion statutes came on the books?

Robert C. Flowers

I think it was-- most of them were in the mid 1800s, Your Honor.

Harry A. Blackmun

In fact, the latter half of the 19th Century.

Do you know why they okayed on them on at that time?

Robert C. Flowers

No, sir, I surely don't.

I'm sorry.

Potter Stewart

The materials indicate that, generally speaking, they're enacted to protect the health and lives of pregnant women because of the danger of operative procedures generally in that era of our history.

Robert C. Flowers

I'm sure that was a great factor, Your Honor.

Warren E. Burger

Well, isn't it historically pretty well accepted as a fact that in the early period in the history of this country, there was general reliance upon religious discipline to preclude this kind of activity, abortions, and when that didn't seem

to cover it, then the states began to enact statutes.

Robert C. Flowers

Yes, sir.

Warren E. Burger

As have been done in England.

Robert C. Flowers

Also, in the exploration and the Indian days, if you wish, the frontier days, I don't imagine that too many abortions were-- intentional abortions were created in these United States.

People were such a necessity to develop the United States.

Thank you.

Warren E. Burger

Mrs. Weddington, you have four minutes left.

Sarah R. Weddington

Thank you, Your Honor.

I think Mr. Flowers well made the point when he said that no one can say here is the dividing line, here is where life begins, here is-- life is here and life is not over here.

In a situation where no one can prove where life begins, where no one can show that the constitution was adopted, that it was meant to protect fetal life, in those situations where it is shown that that kind of decision is so fundamentally a part of individual life of the family, of such fundamental impact on the person--

Byron R. White

I gather your argument is that state may not protect the life of the fetus or with that of abortion even at any time during pregnancy.

Sarah R. Weddington

At this--

Byron R. White

Right up until the moment of birth.

Sarah R. Weddington

At this time, my point is that this particular statute is unconstitutional.

Byron R. White

I understand that but your argument, as the way you state it, is that it wouldn't make any

difference what part of pregnancy that the state would cut the abortion.

It will still be unconstitutional.

Sarah R. Weddington

At this time, there is no indication to show that the constitution would give any protection prior to birth.

That is not before the Court and that is the question I think--

Byron R. White

Well, I don't know whether it is or it isn't.

If the statute you're claiming is a statute that's void on its face.

Sarah R. Weddington

That's correct.

Byron R. White

Now, is it possible the statute-- before you can declare the statute void on its face that you have to say that it's void no matter when in the pregnancy the abortion takes place?

Sarah R. Weddington

It seems to me, in this situation, the Court is-- excuse me, I must-- would you ask the question again?

Byron R. White

Well, is the statute void on the-- could the statute be void on its face if the state could prevent abortions at any time after six months?

Sarah R. Weddington

You mean if the state, in fact, did that?

Byron R. White

No, let's assume that it's unconstitutional for the state to prevent abortions after six months.

Sarah R. Weddington

It would still be void on its face in this situation because it is overly broad.

It interferes in a-- at a time when a state has no--

Byron R. White

This isn't a Free Speech Clause.

The statute might be perfectly valid in part and invalid in part.

You're saying--

Sarah R. Weddington

In areas where--

Byron R. White

It's invalid on its face, totally invalid.

Sarah R. Weddington

Well--

Byron R. White

It may not apply to-- it may not be enough in preventing abortion no matter when the abortion takes place.

Sarah R. Weddington

My argument would, first, be that it's void on its face and, second, if the Court finds it's not void on its face then it certainly is void because it infringes upon the fundamental right at a

time when the state can show no compelling interest early in pregnancy.

Warren E. Burger

What did this Court say about vagueness in the Vuitch case?

What did we say there?

Sarah R. Weddington

There, you said the particular D.C. statute was not void for vagueness.

It's a different statute.

There was an interpretation of the meaning of the statute, and the Court there said the doctor could work within that context and could tell what the statute meant.

Warren E. Burger

Then isn't the only difference between the Texas statute and the D.C. statute that the Texas statute does not have the health factor in it?

Sarah R. Weddington

That's correct, which makes it much more difficult for the doctor to tell when it is const-- when he can act.

Warren E. Burger

But then under Vuitch, unless the Court was prepared to overrule it, nullified the Texas statute would be valid if it was construed to include abortions for the protection of health--

Sarah R. Weddington

Including--

Warren E. Burger

Treating life as broad enough to--

Sarah R. Weddington

Mental and physical.

Warren E. Burger

Include health.

Sarah R. Weddington

But then the question is raised as to the right of privacy which was not before the Court in the Vuitch case and is before the Court in this particular situation.

As to the Hippocratic Oath, it seems to me that that oath was adopted at a time when abortion was extremely dangerous to the health of the

woman and, second, that the oath is to protect life.

And, here, the question is what does life mean in this particular context?

It's the sort of same vagueness that it seems to me that your-- well, okay, life there could be slightly different because of the constitutional implications here.

It seems to me that--

Harry A. Blackmun

Well, Hippocratic Oath went directly and specifically to abort the procedures.

Sarah R. Weddington

To providing abortions.

Harry A. Blackmun

Whatever-- however life was defined.

Sarah R. Weddington

That's correct.

As to mutilation, there, it seems to me that the purpose of those statutes was to prevent the citizen from becoming a dependent or ward of the state and also to ensure that its citizens would be available for service in the military.

In this particular instance, the rationale works just the opposite.

Here, a woman, because of her pregnancy, is often not a productive member of society.

She cannot work.

She cannot hold a job.

She's not eligible for welfare.

She cannot get unemployment compensation, and furthermore, in fact, the pregnancy may produce a child who will become a ward of the state.

We do not object to the cases such as the transfusion case where there is a decision already made by the woman that she desires to carry the pregnancy to term, and when that decision is made that the child should be given every opportunity to come into life a healthy person.

We do not believe that that necessitates the conclusion that, therefore, under the constitution prior to birth a person under the Fourteenth Amendment would exist there.

This case-- this Court is faced with the situation where there have been 14 three-judge Courts that ruled on the

constitutionality of abortion statutes, 9 Courts have favored the woman, 5 have gone against her.

25 judges have favored the woman, 17 have gone against her.

9 circuit judges have favored the woman, 5 have gone against her.

16 District Court judges have favored the woman, 10 have gone against her.

No one is more keenly aware of the gravity of the issues of the moral implications of this case, but it is a case that must be decided on the constitution.

We do not disagree that there is a progression of fetal development.

It is the conclusion to be drawn from that, upon which we disagree.

We are not here to advocate abortion.

We do not ask this Court to rule that abortion is good or desirable in any particular situation.

We are here to advocate that the decision as to whether or not a particular woman will continue to carry or will terminate a pregnancy is a decision that should be made by that individual.

That, in fact, she has a constitutional right to make that decision for herself and that the state has shown no interest in interfering with that decision.

Our supplemental brief on page 14 points out that the brief of the opposition can't quite decide when life does begin.

At one point, they suggest it's when there's implantation.

A few pages later, they suggest it's with conception.

Byron R. White

But any doctor, I suppose, would say-- may refuse her.

Sarah R. Weddington

Certainly, Your Honor, he may.

He may refuse any kind of medical procedure whatsoever.

Byron R. White

But the state?

Sarah R. Weddington

Here, it's the question of whether or not the state by the statute will force the woman to continue.

The woman should be given that freedom, just as the doctor has the freedom to decide what procedures he will carry out and what he will refuse to his patient.

Warren E. Burger

You're out of time now.

Sarah R. Weddington

Okay.

Harry A. Blackmun

To make sure I get your argument in focus, I take it from your recent remarks that you are urging upon us abortion on demand that the woman alone, not in conjunction with her physician.

Sarah R. Weddington

I am urging that, in this particular context, this statute is unconstitutional that in the Baird versus Eisenstadt case, this Court said if the right of privacy is to mean anything, it is the right of the individual, whether married or single, to make determinations for themselves.

It seems to me that you cannot say this is a woman of this particular doctor and this particular woman.

It is, it seems to me, of--

Harry A. Blackmun

Well, doesn't it follow from that then that a woman can come into a doctor's office and say "I want an abortion"?

Sarah R. Weddington

And he can say, "I'm sorry, I don't perform them."

Harry A. Blackmun

And then what does she do?

Sarah R. Weddington

She goes elsewhere, if she so chooses.

If she stays with that-- you know, it's-- that's an impossible question.

Certainly, I don't think the state could say the first doctor a woman goes to shall make that determination, and she cannot go elsewhere.

Warren E. Burger

Your time is up now, Mrs. Weddington.

Sarah R. Weddington

Okay, thank you.

Warren E. Burger

Thank you, Mrs. Weddington.

Thank you, Mr. Flowers.

The case is submitted.
