

The Burger Court Opinion Writing Database

Colautti v. Franklin

439 U.S. 379 (1979)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 2, 1979

Re: 77-891 - Colautti v. Franklin

Dear Byron:

I join your dissenting opinion in this case.

Regards,

WB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

November 27, 1978

RE: No. 77-891 Colautti v. Franklin, et al.

Dear Harry:

I'm delighted to join the fine opinion you have
written for the Court in this case.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 27, 1978

Re: No. 77-891, Colautti v. Franklin

Dear Harry,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.
✓

Mr. Justice Blackmun

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 24, 1978

Re: 77-891 - Colautti v. Franklin

Dear Harry,

In due course, I shall circulate a
dissent in this case.

Sincerely yours,



Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE BYRON R. WHITE

Dear Harry,

My apologies for not having the dissent ready in Franklin. We were mobbed by visitors last weekend, and the argued cases this week have taken far more time than I had anticipated. In any event, I have not finished the dissent, and I hope you will bear with me. I should also add that I have not found it to be such an easy case.

Sincerely

Byron

Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

FROM: Mr. Justice White

1st DRAFT

12-29-76

Discriminated:

SUPREME COURT OF THE UNITED STATES

No. 77-891

Aldo Colautti, Secretary of Welfare of Pennsylvania, et al.,
 Petitioners,
 v.
 John Franklin et al. } On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[January —, 1979]

MR. JUSTICE WHITE, dissenting.

Because the Court now withdraws from the States a substantial measure of the power to protect fetal life that was reserved to them in *Roe v. Wade*, 410 U. S. 113 (1973), and reaffirmed in *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52 (1976), I file this dissent.

I

In *Roe v. Wade*, the Court defined the term "viability" to signify the stage at which a fetus is "potentially able to live outside the mother's womb, albeit with artificial aid." This is the point at which the State's interest in protecting fetal life becomes sufficiently strong to permit it to "go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.*, at 163-164.

The Court obviously crafted its definition of viability with some care, and it chose to define that term not as that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, with or without artificial aid, but as that point at which the fetus is *potentially* able to survive. In the ordinary usage of these words, being *able* and being *potentially able* do not mean the same thing. Potential ability is not actual ability. It is ability "[e]xisting in possibility, not in actuality." Webster's

Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

STYLISTIC CHANGES THROUGHOUT.
 SEE PAGES: 1, 2, 4, 7

From: Mr. Justice White

Circulated: _____

Recirculated: 4 JAN 1970

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-891

Aldo Colautti, Secretary of Welfare of Pennsylvania, et al.,
 Petitioners,
 v.
 John Franklin et al. } On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[January —, 1979]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Because the Court now withdraws from the States a substantial measure of the power to protect fetal life that was reserved to them in *Roe v. Wade*, 410 U. S. 113 (1973), and reaffirmed in *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52 (1976), I file this dissent.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 4, 1979

Re: No. 77-891 - Colautti v. Franklin

MEMORANDUM TO MR. JUSTICE BLACKMUN:

I plan to add the following footnote
just before the citation in the paragraph
ending at the top of page 8:

"Unquestionably, rehabilitating
§ 5(a) to satisfy this Court's
opinion will be a far more ex-
tensive and more difficult task
than that which the State faced
under the District Court's ruling."

With this change, I should be ready to
bring the case down early in the week if
you choose to do so.

BRW
BRW

Copies to the Conference

Mr. Justice BRENNAN
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice REHNQUIST
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

3rd DRAFT

Recirculated: 5 JAN 1979

SUPREME COURT OF THE UNITED STATES

No. 77-891

Aldo Colautti, Secretary of Welfare of Pennsylvania, et al.,
Petitioners,
v.
John Franklin et al. } On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[January —, 1979]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Because the Court now withdraws from the States a substantial measure of the power to protect fetal life that was reserved to them in *Roe v. Wade*, 410 U. S. 113 (1973), and reaffirmed in *Planned Parenthood of Missouri v. Danforth*, 428 U. S. 52 (1976), I file this dissent.

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The Court obviously crafted its definition of viability with some care, and it chose to define that term not as that stage of development at which the fetus actually *is* able or actually *has* the ability to survive outside the mother's womb, with or without artificial aid, but as that point at which the fetus is *potentially* able to survive. In the ordinary usage of these words, being *able* and being *potentially able* do not mean the same thing. Potential ability is not actual ability. It is

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

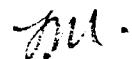
November 22, 1978

Re: No. 77-891 - Colautti v. Franklin

Dear Harry:

Please join me.

Sincerely,



T.M.

Justice Blackmun

cc: The Conference

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: NOV 22 1978

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-891

Aldo Colautti, Secretary of Welfare of Pennsylvania, et al.,
Petitioners,
v.
John Franklin et al. } On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[December —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

At issue here is the constitutionality of subsection (a) of § 5¹ of the Pennsylvania Abortion Control Act, Act No. 209 of 1974, Pa. Stat. Ann., Tit. 35, § 6605 (a) (Purdon). This statute subjects a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily

¹ Section 5 reads in pertinent part:

"(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

"(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

November 28, 1978

Re: No. 77-891 - Colautti v. Franklin

Dear Potter:

I appreciate your thoughtful review of the proposed opinion in this case and the suggestion that the word "couple," as it appears at two places on page 10, might be omitted or changed. I tentatively agreed with your suggestion when we talked by telephone, but on further review I wonder whether the change is indicated. What I am doing in those two places is outlining the respective arguments of the appellees and the appellants. Both sides focused on the couple. See, for example, page 9 of the brief for the appellees.

I suppose it isn't too important anyway because we do not reach the argument or suggestion about genetically defective fetuses. On balance, unless you feel very strongly, I am inclined to leave the first reference to "couple" (the 11th line on page 10) just as it is, and to eliminate the second reference ("or the couple" in the 9th line of the full paragraph). I hope this is all right with you.

Sincerely,

HAB
JS agrees
by 50 pm 28 Nov '78
12

Mr. Justice Stewart

14.17-18.21
9.10.1
pp.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

4 JAN 1979

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-891

Aldo Colautti, Secretary of Welfare of Pennsylvania, et al.,
Petitioners,
v.
John Franklin et al. } On Appeal from the United States District Court for the Eastern District of Pennsylvania.

[December —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

At issue here is the constitutionality of subsection (a) of § 5¹ of the Pennsylvania Abortion Control Act, Act No. 209 of 1974, Pa. Stat. Ann., Tit. 35, § 6605 (a) (Purdon). This statute subjects a physician who performs an abortion to potential criminal liability if he fails to utilize a statutorily

¹ Section 5 reads in pertinent part:

"(a) Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.

"(d) Any person who fails to make the determination provided for in subsection (a) of this section, or who fails to exercise the degree of professional skill, care and diligence or to provide the abortion technique as provided for in subsection (a) of this section . . . shall be subject to such civil or criminal liability as would pertain to him had the fetus been a child who was intended to be born and not aborted."

H.A B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 24, 1979

MEMORANDUM TO THE CONFERENCE

Re: Hold for No. 77-891, Colautti v. Franklin

Only one case has been held for Colautti. It is No. 77-1255, Anders v. Floyd. Anders is an appeal from a judgment of a three-judge District Court for the District of South Carolina, 440 F. Supp. 535 (1977). It presents a difficult Younger question, in addition to questions about the District Court's application of the concept of "viability" and the constitutionality of the South Carolina abortion statute.

I

Appellee, Doctor Jesse J. Floyd, is a Columbia, South Carolina, physician. "Louise Doe," an unmarried woman 20 years of age, came to Doctor Floyd's office in July 1975 after another physician had informed her that she was 18-20 weeks pregnant. Floyd concluded on the basis of his own examination that the patient was approximately 20 weeks pregnant. Because of the advanced stage of her pregnancy, he recommended that the abortion she sought be performed in a hospital.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 7, 1978

No. 77-891 Colauitti v. Franklin

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 2, 1979

Re: No. 77-891 Colautti v. Franklin

Dear Byron:

Please join me in your dissent.

Sincerely,



Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 27, 1978

Re: 77-891 - Colautti v. Franklin

Dear Harry:

Please join me.

Respectfully,



Mr. Justice Blackmun

Copies to the Conference