

## August 1, 2016; The Questions in *Roe v. Wade*

As I stated last week, the 1973 abortion case of *Roe v. Wade* is one of Supreme Court's most controversial cases. Prior to *Roe*, 49 states and Washington D.C. had passed laws labelling most abortions as crimes, punishable by imprisonment. Connecticut passed the first anti-abortion law in 1822. The Texas' abortion law dated back to 1854 and, like the majority of states, prohibited an abortion except when a doctor determined it was necessary to save the mother's life.

In 1971, a single, pregnant lady, who used the alias "Jane Roe" to protect her true identity, challenged the Texas law. She argued that the law violated her 14<sup>th</sup> Amendment right to privacy. John Wade, the county District Attorney, was responsible for enforcing the law. The case eventually made its way to the U.S. Supreme Court.

The primary questions before the Court included:

1. Do laws that criminalize all abortions, except when necessary to save the mother's life, violate the Constitution?

2. Does the Due Process clause of the 14<sup>th</sup> Amendment to the U.S. Constitution protect the right of privacy, including the right to pursue an abortion?

The state of Texas asserted that the answer to both questions was "no." After all, there is no mention of the word "abortion" anywhere in the Constitution. Further, Roe was misguided in her argument that the 14<sup>th</sup> Amendment gives her a "right" to abort her child. After all, the 14<sup>th</sup> Amendment, which provides in part that "No state shall . . . deprive any person of life, liberty, or property without due process of law," was passed in 1868. By then, Texas, along with several other states, had already enacted its anti-abortion law. Those who wrote and passed the 14<sup>th</sup> Amendment were well aware of this fact and yet, again, made no mention of "abortion." They therefore intentionally chose not to create or protect a "right" to an abortion.

Texas further argued that, contrary to Roe's contention that the 14<sup>th</sup> Amendment gave her a right to abort her child, the 14<sup>th</sup> Amendment actually protects the unborn child's right to live. This is true because a fetus is a "person" within the meaning of the 14<sup>th</sup> Amendment. So, laws permitting abortions would necessarily "deprive" a person of "life," and are therefore constitutionally prohibited.

Texas also made a distinction between the Supreme Court's ruling in the 1965 *Griswold v Connecticut* case, which I discussed last week, and the *Roe* case. In *Griswold*, the Court ruled that a Connecticut law that prohibited the distribution and use of contraceptives violated *Griswold's* fundamental constitutional right of privacy. Such a law could only survive if the state can prove the restriction is "compelling."

Texas noted that while the use of contraceptives takes place in a private setting, an abortion is performed in a hospital or clinic by a virtual stranger, and is therefore not a matter of “privacy.” Further, even if a right to privacy is implicated in the law, Texas has a compelling state interest to protect the life of an unborn child.

Many Americans agreed with the arguments made by the state of Texas in its effort to maintain its abortion law. However, for reasons I’ll discuss next week, the Supreme Court disagreed with Texas’ arguments and ruled in favor of Roe.