

August 8, 2016: Guidelines in *Roe v. Wade*

Last week, we reviewed some of the main legal arguments presented by the State of Texas in support of its criminal abortion law in the 1973 case of *Roe v. Wade*. The Texas statute only permitted abortions if the mother's health was at risk.

Ultimately, the Supreme Court ruled against Texas and found its criminal abortion law unconstitutional. In reading the Court's decision, the reader senses immediately that the justices were well aware of the controversial nature surrounding the topic of abortion. Justice Blackmun, writing for the majority, stated: "We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires."

However, he reminded readers of the Court's legal mission. "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection." Obviously, this was no easy task and even today, some 43 years later, many people continue to vehemently disagree with the Court's decision.

The Court started out by reviewing the history of abortion both in the U.S. and abroad and concluded that strict abortion laws were relatively recent developments and not of ancient origins as claimed by those supporting the law. Therefore, history itself didn't lend significant strength to Texas' arguments.

The Court also determined that a fetus is not a "person" for the purpose of triggering the 14th Amendment. Consequently, a decision to abort a fetus does not deprive the life of a "person" and may be permissible under certain conditions.

Although the Court agreed with the Texas defenders' contention that abortion is not mentioned in the U.S. Constitution, the Court referred to a number of their past decisions in which they had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." The Court found this "zone" of privacy came from the 1st, 4th, 5th and 14th Amendments. In past Supreme Court decisions, these privacy rights had been found to extend to activities related to marriage, procreation, contraceptives, family matters, child rearing and education.

Based on these past decisions, the Court expanded the zone of privacy to include abortions and found that the Texas criminal law violated Roe's right to privacy. HOWEVER, the Court went on to say that the right to abortion was not absolute. Citing medical evidence, the Court divided pregnancies into trimesters, and set down the following guidelines:

For the first trimester the abortion decision must be left to the judgment of the pregnant woman and her attending physician. The State can't stop an abortion at this stage.

During the second trimester, the State, in promoting its compelling interest in the health of the mother, can regulate the abortion procedure in ways that are reasonably related to protecting maternal health.

For the third trimester, the State, in recognition of the fact that the fetus may now be able to survive outside the womb, has a compelling interest in protecting the life of the developing fetus. So, the State can regulate and even outlaw abortions, except where it is necessary to protect the mother's health.

Unfortunately, as we'll learn in next week's column, subsequent Supreme Court decisions have further complicated the situation.