AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: **Interested Persons**
Date: **March 2019**
From: **A. Eric Johnston**
Re: **What is Happening with Abortion Laws in the U.S.?**

Have you asked yourself why lawmakers in states like Virginia, Rhode Island, New York, and others have begun introducing very extravagant late term abortion laws, up to and including infanticide? The embattled Virginia governor, a former pediatrician, advocated infanticide when he said, "The infant would be delivered" and kept "comfortable," while the mother conferred with physicians on whether to kill the child.

In our recent publications we have suggested it is time to test the holding of *Roe v. Wade* that an unborn child is not a person. We believe abortion advocates are seeing the same thing and acting quickly to enshrine in their states' laws late term abortion statutes, just in case *Roe* is reversed. However, as a recent Wall Street Journal editorial suggested, this may be "Abortion's Dred Scott Moment." Cardinal Dolan, Archbishop of New York, was referring to the *Dred Scott v. Sandford* case (1857) that held black persons were not persons within the meaning of the U.S. Constitution. Citing Civil War scholar Shelby Foote, Cardinal Dolan said this decision backfired causing a deeply divided nation to engage in a civil war. While he does not suggest we will have another civil war, today more Americans are admitting 'My God, that's sure not what we wanted. Doesn't the baby have any rights?'"

The decision in *Roe* was based on personhood, that is, an unborn child is not a person within the meaning of the U.S. Constitution. If the U.S. Supreme Court ("SCOTUS") reverses *Roe*, it will likely, though not for certain, leave it to the states to determine whether each will respect life or take life. This will perhaps create a dichotomy concerning if the child is a "person" how can a state take its life? It is foreseeable that the states mentioned above, along with others will want to protect abortion rights. At the same time, other states will want to protect life, like Idaho and Oklahoma where recently filed bills make abortion murder.

Lawmakers in some states are still considering passing heartbeat bills. These may prohibit abortions after about ten weeks. This idea was first surfaced in 2011 and has gained some traction, but has run into problems in the courts. The real problem with heartbeat bills is that if a heartbeat bill is constitutional, then a bill prohibiting abortion from conception is also constitutional. Cases after *Roe* have held that states may only prohibit abortion at or after viability, that is, when the child might be able to live outside the womb. No federal court decision has gone below that threshold. To go below that threshold will require SCOTUS to find the unborn child to be a "person" entitled to legal protection. Therefore, a law prohibiting abortion from conception is as probable to be constitutional as a law prohibiting abortion when there is a heartbeat. So, why sacrifice about eight weeks of unborn children and still keep abortion legal? Normally, within about two weeks of conception a pregnancy can be determined and at that point prosecutors could charge one who commits an abortion with murder. Alabama does not need to jump on the heartbeat bandwagon. Other states are testing that position. Alabama must do more.

Alabama's Criminal Code, the Brody Act, §13A-6-1(a)(3), defines a person for homicide reasons as "a human being, including an unborn child in utero at any stage of development, regardless of viability." That same standard should be applied in removing the exception for abortion on the basis that *Roe* is a flawed constitutional decision. Last November citizens voted overwhelmingly to support Amendment 2, finding the unborn child in Alabama to be protected under all its laws and that there is no right to abortion. The Alabama Legislature should step up now and criminalize abortion. The Alabama Pro-Life Coalition supports a bill to do so. This is not about woman's rights. It is about the life of a defenseless human being.

There are continuing developments at SCOTUS on abortion issues. Last month's Educational Update explained we should not read too much into the court's failure to review a state's decision to continue funding Planned Parenthood. More recently, SCOTUS was asked to review *June Medical Services, LLC v. Gee*, where the Fifth Circuit Court of Appeals had held constitutional a Louisiana law requiring abortionists to have local hospital admitting privileges. In 2016, SCOTUS ruled in *Whole Woman's Health v. Hellerstedt* that admitting privileges laws were unconstitutional. When the Louisiana case was presented, Chief Justice John Roberts joined the liberals on the court to stay the Fifth Circuit opinion while on review. Suddenly, everyone is concerned whether the Chief Justice is pro-abortion. Again, we cannot read too much into this. The Chief Justice dissented in the *Hellerstedt* case joining the pro-life conservatives. *Hellerstedt* is the law of the land and it makes sense that *June Medical Services* be stayed on review. *Roe* was confirmed in the *Planned Parenthood v Casey* decision in 1992 by only a three-justice vote. There are likely four votes to reverse *Roe* and hopefully Chief Justice Roberts would join those four, rather than the liberal justices, to restore sanity to the sanctity of life.

These cases do not give any indication to how justices will rule on *Roe*. It is an indication that cases dealing with abortion regulatory issues are tricky, uncertain and still must operate under the *Casey* "undue burden" rule. That is, anything that places an undue burden on the woman's right to an abortion is unconstitutional. More importantly, these cases do not deal with the foundational issue of personhood created by *Roe*. That is the issue, not heartbeat, not admitting privileges, not dismemberment, but the issue of personhood to be before SCOTUS.