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

To: **Interested Persons**
Date: **July 2022**
From: **A. Eric Johnston**
RE: ***Roe* and *Casey* Overruled – Abortion is not a Constitutional Right any Longer**

In 2018, the Alabama Pro-Life Coalition thought the time might be ripe for a review of *Roe v. Wade* and *Planned Parenthood v. Casey*, which legalized abortion on demand. In 2019, we authored the Alabama Human Life Protection Act ("AHLPA"), with the idea of being among those states which may be bringing cases to SCOTUS for review. *Dobbs v. Jackson Women's Health Organization,* a case involving a Mississippi law limiting abortion to before fifteen weeks, was the first case to make it.

In a five-four majority, Justice Samuel Alito writing for the court, rejected any incremental approach and completely threw out the right to abortion as a federal right under the U.S. Constitution. The opinion leaves the decision to the states. The opinion concentrated on two issues. The first is whether there is a U.S. Constitutional right to an abortion and the second being whether the doctrine of *stare decisis* would keep *Roe* and *Casey* in place. The opinion is very similar to the one leaked in February, but is significantly stronger. The opinion leaves no doubt that the federal right to abortion no longer exists in America. Whether an abortion is permitted is left up to individual states.

Without mincing words, the opinion began that "even though the Constitution makes no mention of abortion, the court [in *Roe*] held that it confers a broad right to obtain one. It did not claim that American law or the Common Law had ever recognized such a right, and a survey of history ranged from the constitutionally irrelevant… to the plainly incorrect …." The opinion stopped short of calling prior Justices by name, but certainly pointed out the egregious miscarriage of justice for which they were guilty. The majority opinion, in a nutshell, states:

> "We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision including the one on which the defenders of *Roe* and *Casey* now chiefly rely – the Due Process Clause of the 14th Amendment. That provision has been held to guarantee some rights that are not mentioned in the constitution, but any such right must be 'deeply rooted in this nation's history and tradition' and 'implicit in a concept of ordered liberty."'
>
> "The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in America… *Roe's* defenders characterized the abortion right as similar to the rights recognized in past decisions involving matters such as intimate sexual relations, contraception, and marriage, but abortion is fundamentally different, as both *Roe* and *Casey* acknowledge, because it destroys what those decisions called 'fetal life' and what the law now before us describes as an unborn human being" *** "*Stare decisis,* the doctrine on which *Casey's* controlling opinion was based, does not compel upending adherence to *Roe's* judicial authority. *Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing back a national settlement of the abortion issue, *Roe* and *Casey* have inflamed debate and deepened division. It is time to heed the constitution and return the issue of abortion to the people's elected representatives."

Following that summary, the court went into detail on why there is no constitutional right to abortion. Specifically, the word is not mentioned in the constitution. However, according to *Roe* and *Casey,* the right exists under one's rights of privacy or liberty. Those rights are based in the 14th Amendment, as well as some other amendments which *Roe* and *Casey* mentioned. However, after examining the history of abortion, the court holds such right does not exist. There's no evidence of such rights being deeply rooted in history and tradition or being essential to the nations "scheme of ordered liberty."

Importantly, the right to abortion is not found in the 14th Amendment's Due Process Clause. It is not a right protected by the constitution for which one can be deprived. "…[A] state's regulation of abortion is not a "sex-based classification" and is thus not subject to "heightened scrutiny" … "Rather, they are governed by the same standard of review as other health and safety measures."

This statement is for educational purposes only. It is not intended to provide legal assistance. We hope if you have questions or know of those who do, you will contact us and we can assist through referral to one of our cooperating attorneys. © 2022, Southeast Law Institute.

The standard of review for other health and safety matters is a rational basis review. In other words, "…states may regulate abortion for legitimate reasons, but when such regulations are challenged under the constitution, courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies." *** "A law regulating abortion, like other health and welfare laws, is entitled to 'strong presumption of validity.' It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests… These legitimate interests include respect for and preservation of prenatal life at all stages of development…." Since there is no long history of abortion rights and ordered liberty, these rights do not exist and "…the people in various states may elevate those interests differently. In some states, citizens may believe that the abortion right should be more extensive than the right that *Roe* and *Casey* recognized. Citizens in other states may wish to impose tight restrictions based on their belief that abortion destroys an 'unborn human being."'

The next area of inquiry was whether SCOTUS should disturb the *Roe* and *Casey* precedents. The doctrine of *stare decisis* essentially states that courts will base their continuing opinions on precedent and not disturb earlier opinions. However, the doctrine is "not an inexorable command." Courts, like people, make mistakes. The court examined several factors to be reviewed in determining whether prior precedents should be reversed. The first was the "nature of the court's error" having found that "*Roe* was also egregiously wrong and deeply damaging… and on a collision course with the constitution from the day it was decided…" The court referenced Justice Byron White's dissent in *Roe* that the court acted only through its "raw judicial power" to "usurp the power to address the question of profound moral and social importance that the constitution unequivocally leaves for the people." In other words, the court's error was so significant that it demanded reversal.

The court also examined the quality of the reasoning in *Roe*. Finding that it totally failed on its historical review, there was no quality. Additionally, the plurality opinion in *Casey* "pointedly reframed from endorsing most of [*Roe's*] reasoning. Therefore, neither case had the requisite strength to continue as precedent.

A third factor examined was whether the opinion was workable. In several places the opinion pointed out that in *Roe* and *Casey* SCOTUS was acting like a legislative body. The trimester concept, the viability concept, and then the undue burden standard that *Roe* and *Casey* created were all unworkable theories, without history or explanation, and without the court providing guidance. How then could these opinions be workable?

Two wrongs do not make a right. What would *Dobbs* do? Three wrongs would not have made a right. Both *Roe* and *Casey* were wrong, yet the issue of abortion raged for another thirty years after *Casey*. *Casey* should have reversed *Roe*, but the doctrine *stare decisis* kept that from happening. Finally, in *Dobbs*, the court has removed the so called right of abortion from the U.S. Constitution.

On the day *Dobbs* was released, Attorney General Steve Marshall filed a motion to dismiss the case against AHLPA and Judge Myron Thompson granted it. Alabama's law went into effect immediately.

We had hoped *Dobbs* would define the unborn child as a "person" within the meaning of the U.S. Constitution, thereby prohibiting abortion everywhere. Both Alito in the main opinion and Kavanaugh in his concurring opinion did not do that. The decision is left to the states. Also, we must be wary that the U.S. Congress could establish a national statute prohibiting abortion. The Supremacy Clause of the U.S. Constitution may override state laws. That is why federal elections are so important.

For now in Alabama, we accomplished our goal. The unborn child is a person here.

Many committed Alabamians have worked for many years to accomplish the goal that has now been reached. We initially worked prior to *Casey* for a reversal of *Roe.* When that did not happen, Alabama passed a law to prohibit post viability abortions and then numerous other laws to improve the healthcare of women, along with reducing the number of abortions. While there may be minor changes to our course, we have finally protected unborn children in Alabama.

The Alabama Pro-Life Coalition will now turn its attention to helping those women, unborn children and their families who have unexpected or problem pregnancies. APLC worked last year and is already working this year on several projects to provide aide to them. It will be seeking assistance from state agencies as well as non-governmental agencies to provide resources of every description to help those in need. SLI is pleased to be a partner with their efforts. Also, we must address the issue of the FDA permitting the purchasing of abortion producing drugs from out of state. This is prohibited by the AHLPA, but must be enforced. We will have issues still unknown to address.

This statement is for educational purposes only. It is not intended to provide legal assistance. We hope if you have questions or know of those who do, you will contact us and we can assist through referral to one of our cooperating attorneys. © 2022, Southeast Law Institute.