

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

To: SLI Supporters
Date: April 2006
From: A. Eric Johnston
Re: Is It Time to Confront *Roe v. Wade*?

South Dakota's governor just signed into law a statute forbidding abortion, except to save the life of the mother. At least four other states are considering similar laws. As a result, there is the suggestion that it is time to confront the *Roe v. Wade* decision which legalized abortion. Many urge Alabama to pass a statute. A number of legislators were interested in filing bills and two were filed. This raises the question of whether Alabama should begin this process. The short answer is, we believe the efforts are premature and could cause great damage.

We have heard the idea originated with a pro-abortion group in Texas. Their strategy was to get one more legal precedent into place, in addition to the leading precedents of *Roe v. Wade* (1973) and *Casey v. Planned Parenthood of Pennsylvania* (1992), before we get a pro-life U.S. Supreme Court majority. This makes a great deal of sense, since there is always the prospect of a fifth pro-life justice being added to the U.S. Supreme Court. The possibility or timing of a new justice is unknown and cannot be planned, but the probability is that it may be longer than sooner. Consequently, there may be time to get another *Roe* or *Casey* affirming decision, which would make it all the more difficult to overturn the so-called "right to abortion."

The South Dakota law is in direct conflict with *Roe* and *Casey*. This means it will be enjoined by a federal U.S. district (trial) court, which will be affirmed on appeal by the Eighth Circuit Court of Appeals. If *certiorari* (review) is granted, the U.S. Supreme Court would review the law and the lower courts' decisions. What would the U.S. Supreme Court do?

As most constitutional lawyers count votes on the U.S. Supreme Court, there are still only four votes to reverse *Roe* and *Casey*, viz., Justices Scalia, Thomas, Alito and Chief Justice Roberts. Clear votes in favor of *Roe* and *Casey* are Justices Stevens, Souter, Ginsburg, and Breyer. That leaves the one remaining vote of Justice Kennedy. Some suggest Kennedy might change and swing more conservative with the changing complexion of the court. However, Kennedy has been consistent in his middle-of-the-road positions and his passive, if not sometimes obvious, support of abortion. We believe it is unlikely Kennedy will vote to overturn either *Roe* or *Casey*. Consequently, we remain in a five-four pro-abortion majority.

Many are suggesting that by the time the South Dakota law matriculates to the U.S. Supreme Court there will be the fifth pro-life justice who will make up the majority necessary to reverse *Roe* and *Casey*. In 2008 there will be a new president. We cannot predict who that will be. Even if it is a Republican, we have no assurance he will appoint a pro-life justice. Cf., Ronald Reagan's appointment of Sandra Day O'Connor and George H. W. Bush's appointment of David Souter. Also, we have been waiting since at least 1981 to have a sufficient number of pro-life justices appointed in order to reverse *Roe*. President Reagan appointed Justice O'Connor in 1981, Justice Scalia in 1984, and then Justice Kennedy in 1988. We were hoping all would be pro-life justices, but they were not. Throughout the 1980s we had hopes of gaining a majority on the U.S. Supreme Court, but it did not happen then and it has not happened yet. In fact, while we believe Roberts and Alito will be favorable, there is no guarantee.

It is not wise to begin now a frontal assault on *Roe* and *Casey*. It would be very detrimental to our effort if a law like South Dakota's set another bad precedent. The doctrine of *stare decisis* is a very serious doctrine for lawyers and judges. You probably noted the long debates about it in the Roberts and Alito Senate hearings. The doctrine is essentially that once a court makes a decision, it will not be changed. Appellant courts have a continuing existence and simply because some of the judges change does not mean the opinions of the court will change. We have every hope, however, that the basis for the right to abortion in *Roe* is so faulty that it will be reversed someday. Therefore, we cannot be premature in confronting *Roe* or *Casey*. Our strategy must have all of the favorable factors in position before we should make this attempt. Thirty-three years of major legal precedent is not easily overcome.

We have explained this to Alabama legislators and they agree the effort may be premature. Alabama's unenforceable weak statute with a broad "health" exception needs to be changed. Section 13A-13-7, 1975 *Code of Alabama* states:

Any person who willfully administers to any pregnant woman any drug or substance or uses or employs any instrument or other means to induce an abortion, miscarriage or premature delivery or aides, abets or prescribes for the same, unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction be fined not less than \$100 nor more than \$1000 and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months.

In conclusion, please understand that we at SLI, as much as any of us, would like to see *Roe* and *Casey* reversed. However, we must not act precipitously or out of emotion, but deliberately and wisely.