

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

**To: SLI Supporters**  
**Date: November 2005**  
**From: A. Eric Johnston**  
**Re: Are Abortion Rights in Danger?**

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A Birmingham News commentator opined that perhaps after race, abortion may be the most inflammable issue in American politics. We believe that is true, but when determining who will be a justice on the United States Supreme Court, abortion may be the most inflammatory issue. The right to abortion is “the” litmus test for a nominee.

Last month SLI’s Educational Update addressed the potential for our new Chief Justice, John Roberts, making changes in abortion jurisprudence. We must understand why the issue is so important at this very time. In recent years the Supreme Court was constituted with six votes to protect abortion (Stevens, O’Connor, Kennedy, Souter, Ginsberg and Breyer) and three votes to eliminate or restrict the right (Rehnquist, Scalia and Thomas). Thus, very little progress was made in the fight against the erroneous decision of *Roe v. Wade*.

**Understanding the Impact of the Abortion Issue**

Understanding the abortion issue and its impact on American politics and culture is important to each of us, notwithstanding that most of us are not personally involved in the abortion decision process or in the politics or legalities of it. Since 1973, polls have consistently demonstrated that about 70 to 75 percent of Americans do not favor abortion.

The Birmingham News commentator also opined that when Bill Clinton said he wanted abortion to be “safe, legal and rare” that was as close to finding a midpoint on the issue as possible. What the commentator misunderstands is that Bill Clinton was not seeking a midpoint, but that his was purely a self-serving political statement meant to garner some conservative votes. There is no middle ground. We do not believe there are a small number of radicals on each end of the spectrum of the issue who keep it going. There are leaders on each side of the issue whom the media designate as radicals, but as the polls suggest, most Americans (who presumably are not radicals) disagree with abortion. That is why so many objected to the nomination of Harriet Miers to replace retiring Justice O’Connor. She was a “stealth candidate” in the non-reflective coating of a Justice Souter. Not knowing how she might vote and not willing to take a chance at such a crucial time resulted in her withdrawal due to conservative pressure.

**A Crucial Time**

President Bush then nominated Samuel Alito, Jr., a circuit judge on the Federal 3rd Circuit Court of Appeals, who has written opinions on abortion and has demonstrated judicial restraint in favor of protecting unborn life and states’ rights of regulation. He would replace the pro-abortion swing vote of O’Connor, should he be confirmed. The significance of this event is demonstrated by looking at where we legally stand on abortion at this time. On November 30, 2005, the case of *Ayotte v. Planned Parenthood* will be argued before the Supreme Court. It involves New Hampshire’s requirement that parents be notified of a teenager’s desire for an abortion.

On January 22, 1973 *Roe v. Wade* established the constitutional right to an abortion and on that same day *Doe v. Bolton* was decided saying any limitation on the abortion right must have an exception for the woman’s health. However, the Supreme Court has construed the health exception so broadly, virtually any reason is an exception. New Hampshire’s parental notification law does not have a health exception and this is the reason Planned Parenthood says it is unconstitutional. O’Connor was the important swing vote in 1992 when the Supreme Court decided *Planned Parenthood v. Casey* which reinforced the right to abortion, but said states could pass laws that could regulate abortion as long as it did not create an “undue burden” on the right to abortion. However, O’Connor voted in 2000 in *Stenberg v. Carhart* that the partial birth abortion ban was unconstitutional because it had no “health exception.” A health exception defined by the old court permits anything. A limited health exception or no exception will substantially limit the “right” to abortion.

**Conclusion**

Therefore, the replacement of O’Connor with someone like Alito may result in a change of interpretation on the court. There still may be a five-four balance in favor of abortion, though there is always the potential that Justice Kennedy will join the expected leadership of Roberts and the others for more sound constitutional jurisprudence which will permit more common sense regulation of abortion. The sanctity of life is one of the most important objectives of SLI. We have not discussed it much this year, though perhaps in passing on several issues. There has been little reason for reports. However, as the liberals very well know, the opportunities for President Bush to nominate pro-life original constructionists to the Supreme Court may offer the chance for which we have been waiting these 32 years. It is time to say something. Tell your senators. (Richard Shelby, 202-224-5744 or senator@shelby.senate.gov) (Jeff Sessions, 202-224-4124 or senator@sessions.senate.gov)