

# Alito v. Pennsylvania

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*by Dr. G. Terry Madonna and Dr. Michael Young*

Since Sam Alito's nomination to the Supreme Court, we have learned much about his record while serving on the Third Circuit Court of Appeals based in Philadelphia. Exhaustive analysis of his decisions have sketched a judge widely respected for judicial temperament, who has been generally socially conservative, pro-government, pro-prosecution, pro-business, supportive of the death penalty, and very tough on immigration issues.

Probably none of his cases has been studied or analyzed more than the Pennsylvania case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.

The *Casey* decision grew out of the 1989 Pennsylvania Abortion Control Act imposing restrictions on abortions, most notably requiring a woman to notify her husband of any planned abortion. When the act was challenged, it first went to the Third Circuit where Alito opined in the minority, arguing that the provision was constitutional; his position, however, was eventually rejected by the US Supreme Court.

Alito's dissent in the case has helped paint him as opposed to abortion rights-- and has been at the heart of the opposition to his confirmation. No issue is more contentious than Alito's position on abortion generally, and *Casey* is at the center of the debate.

Missing from the current reporting; however, has been any assessment of the political environment that led to the passage of the 1989 Pennsylvania law. How Pennsylvania's law came to be at the epicenter of the national abortion debate is an important story.

Morality issues have long pervaded Pennsylvania history. The Quakers who founded the state early mixed large dollops of enlightenment idealism into commonwealth politics--most conspicuously by their strong opposition to slavery. By 1778, one leading state politician noted, "the saints and saint like folk have too much influence." Later a conservative political culture and strong religious mores continued the tradition. The current debate about abortion serves as only the latest chapter in a long running Pennsylvania saga.

Still, abortion issues do hold special prominence. For more than 30 years now, no single issue has been more divisive and polarizing; creating a fault line in the state's politics that cuts across ideological, religious, and gender lines.

The initial chapter in this long running abortion debate began following the 1972 *Roe v. Wade* decision legalizing abortion nationally. In 1974, the Pennsylvania legislature passed legislation imposing among other restrictions, a husband's consent before a woman could obtain an abortion. The bill was vetoed by then Governor Milton Shapp, but overridden by the legislature; the US Supreme Court eventually ruled it unconstitutional several days before Shapp left office in 1979.

But that didn't end it. By 1989 another governor, Governor Robert P. Casey, was in office and the proposed Pennsylvania Abortion Control Act was front and center; the ensuing debate over the proposed abortion restrictions was electric and dominated politics in the state. Supporters and opponents poured into the state in a lobbying effort unparalleled in recent decades--all acutely aware of the national implications of the issue.

Preceding the voting on the legislation, competing rallies of thousands descended on the state capitol adding drama to a highly charged atmosphere.

Ultimately the Pennsylvania Abortion Control Act passed the state legislature overwhelmingly, and Governor Casey signed the law, which provided the most sweeping abortion restrictions since *Roe*. Specifically, it prohibited abortions after 24 weeks, except to save the life of the mother or should the mother suffer a serious bodily impairment; banned abortions at public hospitals except in cases of rape, incest or to save the life of the mother; banned sex selection abortions; established a 24 hour waiting period before obtaining an abortion; and required the notification of husbands before any planned abortion.

The contours of abortion politics in Pennsylvania are well established. Usually efforts to impose abortion restrictions have been initiated and supported by a coalition of Democratic Catholic lawmakers, many from old mining and mill towns and urban centers--allied with conservative, protestant Republican legislators from rural parts of the state.

Pennsylvania political personalities have played a large role. Anti-abortion champions have become legendary in state political lore. During the 1970's, the fiercest anti-abortion advocate was Martin Mullen, the powerful chairman of the House Appropriations Committee; in the 1980's another state representative, Stephen Freind filled the role. Freind was the legislative sponsor of the 1989 Abortion Control Act, now central to Alito's nomination. Both Mullen and Freind ran unsuccessfully for governor and both led crusades against abortion. Into the 1990's, gubernatorial candidate, Peg Luksik, picked up the anti-abortion cudgel. She made impressive showings in two of the three contests she entered.

But it was Governor Casey who became the state's most successful opponent of *Roe* and one of its most vocal national critics. The abortion issue precipitated a major rift between Casey and national Democrats; a clash with Bill Clinton's top advisors in 1992 led to a high profile denial of Casey's request to address the Democratic National Convention in 1992.

Casey never forgave the slight and his passionate opposition to abortion led to huge political consequences for Democratic candidates in the state. Both US Senator Harris Wofford seeking reelection and Lt Governor Mark Singel running for governor in 1994 lost in some measure because Casey turned his back on these pro-choice candidates.

The abortion issue dominated state politics in 1990. Casey, seeking reelection, easily dispatched a primary opponent, abortion rights supporter Phil Berg. He then drew the state's Auditor General Barbara Hafer as his Republican opponent in a campaign highlighted by her support for abortion rights. Hafer had a difficult time winning her own primary against pro-life candidate, Peg Luksik, who won 46-percent of the vote.

Casey won re-election by more than a million votes. In the legislative races, abortion dominated many of the campaigns, creating more volatility than usual and more incumbents were unseated--17 in House elections, more than in the previous decade or after.

Now, a decade later, this turbulent period in state politics has been encapsulated in the debate over the Alito nomination. A judge and a decision once little more than a footnote to that tempestuous era have become the very symbol of it. At this point, it's unclear whether Judge Alito's fate is tied to his role in *Planned*

*Parenthood of Southeastern Pennsylvania v. Casey*. But it seems likely that this long running epic in state history may yet have an epilogue.

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*Politically Uncorrected*<sup>TM</sup> is published twice monthly. Dr. G. Terry Madonna is a Professor of Public Affairs at Franklin & Marshall College, and Dr. Michael Young is a former Professor of Politics and Public Affairs at Penn State University and Managing Partner at Michael Young Strategic Research. The opinions expressed in this article are solely those of the authors and do not necessarily reflect the opinions of any institution or organization with which they are affiliated. This article may be used in whole or part only with appropriate attribution. Copyright © 2006 Terry Madonna and Michael Young.