

# A Fight Worth Having

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## ABSTRACT (ABSTRACT)

Inevitably, abortion will come up, especially because of Judge [Sam Alito]'s vote in *Planned Parenthood v. Casey*. The left will shout that he would ban abortion, but in *Casey* he agreed with a unanimous Third Circuit panel -- upheld by the Supreme Court -- which found that four of Pennsylvania's restrictions on abortion were not an "undue burden" under prior High Court rulings. He was the lone appeals judge to support the law's fifth restriction -- spousal notification -- which the Supreme Court threw out.

It's worth noting that Judge Alito does not automatically rule in favor of laws limiting abortion. In *Planned Parenthood v. Farmer*, he cited the Supreme Court's decision to strike down a Nebraska ban on partial-birth abortion to explain his vote to invalidate a similar law in New Jersey. It is the "responsibility" of judges, he said, "to follow and apply controlling Supreme Court precedent." At least one pro-life group was rumored yesterday to be considering withholding support for Judge Alito over *Farmer* -- which would be an example of the results-based jurisprudence that conservatives criticize when it is practiced by the left.

The nominee's clear respect for precedent ought to satisfy Republican Arlen Specter, the pro-choice chairman of the Senate Judiciary Committee, who said yesterday that abortion will be "one of the first items" he will discuss with the nominee. It should also provide covering fire for center-left Senators Olympia Snowe and Susan Collins to vote for him. As for conservatives, the nomination is already unifying the President's base, which fractured over the Harriet Miers nomination.

## FULL TEXT

With yesterday's nomination of Sam Alito to the Supreme Court, President Bush reached into his John Roberts playbook to name a judicial conservative with impeccable credentials. The nominee deserves to be confirmed easily and soon, and he likely will be -- though not without a tougher fight and probably with a smaller margin of Democratic support.

Like Chief Justice Roberts, Judge Alito is one of the leading jurists on the federal bench, having been appointed to the Third Circuit by the first President Bush and confirmed unanimously by a Democratic-controlled Senate. Before that he served as an assistant solicitor general in the Reagan Administration, arguing 12 cases before the Supreme Court; as U.S. Attorney for New Jersey; and as a deputy assistant attorney general in the Office of Legal Counsel. No one can say he isn't qualified.

However, Judge Alito has put in 15 years on the federal bench, compared with Mr. Roberts's two, and produced a far longer list of judicial opinions that are now being scrutinized for evidence of what kind of Justice he would make. The left is already attacking his rulings, which we agree are notable, but less for their outcomes than for their legal reasoning. Judge Alito shows every sign of being a careful constitutionalist with a deep respect for precedent.

One case we'll be hearing a lot about is *ACLU v. Schundler*. Here Judge Alito carefully balanced two Supreme Court precedents to uphold a holiday display in Jersey City that included "not only a creche, a menorah, and Christmas

tree, but also large plastic figures of Santa Claus and Frosty the Snowman, a red sled, and Kwanzaa symbols."

He made the common-sense argument that having secular objects alongside religious ones ensured that no one would conclude that the government was endorsing any particular religion. Even so, the case posed no small challenge given the mess the Court has made of church- state law -- continuing into last term when it came down on both sides of displaying the Ten Commandments.

Judge Alito has also struck down a school policy that allowed secular groups to distribute informational literature but banned religious organizations from doing so, and he ruled against the Newark police department for preventing Sunni Muslim officers from wearing beards. This sympathy for religious liberty would be a useful addition to the Court and would help counter the hostility to religion in the public square that dominates liberal legal circles.

In commercial cases, his opinions reveal a regard for free markets and a recognition of the legal and regulatory challenges facing business. He's issued rulings in favor of commercial free speech and enforcing contracts as written. He's also a believer in federalism and putting some limits on the Commerce Clause -- as seen in his *Rybar* dissent, where he cited *Lopez* to say Congress lacks the authority to regulate intra-state possession of machine guns. With the death of Chief Justice Rehnquist, this is a needed voice on the Court.

Inevitably, abortion will come up, especially because of Judge Alito's vote in *Planned Parenthood v. Casey*. The left will shout that he would ban abortion, but in *Casey* he agreed with a unanimous Third Circuit panel -- upheld by the Supreme Court -- which found that four of Pennsylvania's restrictions on abortion were not an "undue burden" under prior High Court rulings. He was the lone appeals judge to support the law's fifth restriction -- spousal notification -- which the Supreme Court threw out.

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Meanwhile, liberal interest groups are massing for battle -- though this is as much about raising money for the 2006 election as it is about defeating Judge Alito. Red state Democrats won't be eager to filibuster a man of his credentials, especially when polls show that the vast majority of Americans share his views on abortion and church- state issues.

Finally, a word about Mr. Bush: He deserves credit for quickly putting the Miers defeat behind him and returning to his campaign promise to nominate conservatives even at the risk of a political fight. If liberal Democrats want a battle over judicial philosophy, so be it. This is a rumble worth having.

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