

**RISE TO PERSONHOOD?
THE UNBORN CHILD’S ADVANCE FROM MERE TISSUE TO SECOND-
CLASS CITIZEN
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The so-called right to abortion ushered in by the United States Supreme Court (USSC) in 1973 is based upon the assumption that an unborn child is not a person within the meaning of the United States Constitution. Since *Roe v. Wade*,² the majority of state legislatures, including that of the Commonwealth of Pennsylvania, have chipped away at this assumption by expanding fetal protections in the areas of criminal, tort, and property law. These legislative efforts have been upheld by the Supreme Court of Pennsylvania and suggest the legal and political landscape in this state is ripe for continued expansion of rights of the unborn.

The Supreme Court of Pennsylvania recognizes a mother and her unborn child are separate and distinct entities.³ Standing in the way of recognizing the unborn child as a full person is *Roe*. While Pennsylvania has made great strides in elevating the legal status of a fetus from mere human tissue to an entity worthy of legal protection against third parties, a mother’s so-called right to choose continues to trump those of the unborn.⁴ Should the USSC overrule

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² 410 U.S. 113 (1973).

³ *Commonwealth v. Booth*, 766 A.2d 843 (Pa. 2001) (citing *Sinkler v. Kneale*, 164 A.2d 93, 96 (Pa. 1960)). This represents the culmination of a slow but seismic reversal of decades of case law, both within and without Pennsylvania, that held that the mother and her child were legally indistinguishable until birth.

⁴ Appellate courts in several other states have ruled that the protection of a woman’s privacy interest under *Roe* is irrelevant to a non-consensual homicide. See, e.g., *People v. Davis*, 872 P.2d 591 (Cal. 1994); *People v. Ford*, 581 N.E.2d 1189 (Ill. App. Ct. 1991); *State v. Merrill*, 450 N.W.2d 318 (Minn. 1990).

Roe, Pennsylvania could prove fertile ground to enact pro-life legislation that will usher the unborn child into full legal personhood.⁵

As this paper will illustrate, the Supreme Court of Pennsylvania is deferential to the state legislature, at times to a fault. Unlike some supreme courts, this Court has done little to expand upon the will of the people as expressed in legislation relating to life issues. In fact, it has rarely weighed in on life issues. While the Pennsylvania Legislature has consistently passed laws to provide greater protection to the unborn child, its judicial counterpart has resisted any urge to become an activist court.

Finally, it must be noted this Court is in a state of flux. As a result of mandatory retirement age (seventy), recent retention votes, and voluntary resignation, more than half of the membership of the Court has been altered in the past five years.⁶

I. LIFE ISSUES

Although Pennsylvania falls solidly within the “swing-state” category when it comes to presidential politics, historically the Commonwealth has been pro-life without being pro-active. Strides have been made to address and blunt the effect of *Roe*,⁷ but Pennsylvania is not a leader among its peers.

⁵ A brief review of the state’s recent political history provides some interesting context. In the past twenty years, Pennsylvania voters have elected pro-choice Republicans to statewide offices, such as U.S. Senator Arlen Specter (1986 to present) and pro-life Democratic candidates, such as Governor Bob Casey, Sr. (1987–1995), and his son U.S. Senator-Elect Bob Casey Jr. (elected on November 7, 2006 after defeating one of the staunchest pro-life senators in recent memory, Rick Santorum). In terms of Presidential elections, the Commonwealth of Pennsylvania continues to be a swing state, never easily pegged as a “red state” or “blue state.” It has, however, trended Democratic in the past three Presidential elections after being in the Republican column from 1980 through 1992.

⁶ Only one justice (Chief Justice Cappy) out of seven has sat on the bench for more than eight years. Three of the justices (Justices Eakin, Baer, and Baldwin) have been on the bench five or fewer years.

⁷ 410 U.S. 113 (1973).

Abortion

It is the stated policy of the Commonwealth of Pennsylvania to “favor childbirth over abortion.”⁸ Prior to *Roe*, the Commonwealth of Pennsylvania maintained some of the strictest abortion laws in the country. Undeterred by *Roe*, the Pennsylvania Legislature passed the Abortion Control Act (“ACA”), which set forth stringent limitations on abortions. Before its enactment, however, the ACA became entangled in litigation.⁹ In its current form, the ACA permits informed consent abortions prior to the 24th week.¹⁰ Pennsylvania’s Abortion Control Act has been free of substantive legal challenges in the past decade.

While the ACA dictates “the common and statutory law of Pennsylvania shall be construed so as to extend to the unborn the equal protection of the laws and to further the public policy of this commonwealth encouraging childbirth over abortion,”¹¹ that policy has not necessarily played out as expected at the Pennsylvania Supreme Court. The Court has drawn a bright line at viability. For example, the Supreme Court has explained Pennsylvania law does not recognize a legal basis for wrongful death and survival actions brought on behalf of the estate of a non-viable fetus which is fatally injured while in the womb, unless a live birth results.¹²

⁸ 62 PA. CONS. STAT. § 453 provides that:

Since it is the public policy of the Commonwealth to favor childbirth over abortion, no Commonwealth funds and no Federal funds which are appropriated by the Commonwealth shall be expended by any State or local government agency for the performance of abortion: Provided, that nothing in this act shall be construed to deny the use of funds where a physician has certified in writing that the life of the mother would be endangered if the fetus were carried to full term or except for such medical procedures necessary for the victims of rape or incest which such rape or incest has been reported promptly to a law enforcement agency or public health service.

⁹ The USSC, in a 5-4 decision, upheld the appellate court’s invalidation of specified provisions of the ACA. *See Thornburg v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

¹⁰ 18 PA. CONS. STAT. ANN. § 3202(a). Prior to the 1989 amendment, except in medical emergencies, once a pregnancy had progressed passed 19 weeks, the physician was required to determine whether, in his good faith judgment, the child was viable. Where viability was found, the physician was to report the basis for his determination that the abortion was necessary to preserve maternal life or health.

¹¹ 18 PA. CONS. STAT. § 3202(c).

¹² *Hudak v. Georgy*, 634 A.2d 600, 602 (Pa. 1993).

However, Pennsylvania law affirms “the family is the basic unit in society and the protection and preservation of the family is of paramount public concern.”¹³ In the age of designer pregnancies, the ACA expressly prohibits abortions solely because of the gender of the unborn child.¹⁴

Despite pro-abortion efforts, the courts have explained the legislative decision to preclude a cause of action for wrongful birth does not place a government obstacle in the path of a woman's right to choose to abort a fetus for whatever reason. Her freedom to decide is not impaired by a statute denying her the right to bring an action against the physician who has negligently failed to advise her correctly regarding the health of the fetus.¹⁵ To better understand to ACA, it is helpful to understand its major provisions:

1. Medical Consultation - § 3204 prohibits an abortion unless a physician determines the procedure is necessary based upon all factors (physical, emotional, psychological, familial and age) relevant to the well-being of the woman. Abortions sought solely because of the sex of the unborn child are not permitted.

2. Informed Consent - § 3205 imposes a 24-hour waiting period after providing information about the procedure and certification by the woman in writing that said information

¹³ *Savage v. Savage*, 736 A.2d 633, 645 (Pa. Super. Ct. 1999) (citing 23 PA. CONS. STAT. § 3102).

¹⁴ 18 PA. CONS. STAT. § 3204(c).

¹⁵ *Dansby v. Thomas Jefferson Univ. Hosp.*, 623 A.2d 816, 819 (Pa. Super. Ct. 1993). The Court explained that the "refusal to create new tort liability does not constitute governmental interference with the constitutionally protected access to abortion. The right to seek an abortion is neither predicated upon the existence of a negligence cause of action, nor is it deterred by the absence of such a cause of action." *Id.* (quoting *Speck v. Finegold*, 497 Pa. 77, 97, (1981)). In another case, a group of named individuals, a clergyman, a physician, and several non-profit medical service organizations brought suit seeking declaratory and injunctive relief to prohibit the implementation of a portion of the Abortion Control Act which dealt with the public funding of abortion. *Fischer v. Commonwealth, Dep't of Pub. Welfare*, 482 A.2d 1148, 1159 (Pa. Commw. Ct. 1984) (en banc), *aff'd*, 509 Pa. 293 (1985). The Act required a victim to report a rape within 72 hours to a law enforcement agency or public health facility to qualify for public funding of an abortion. The Act also required a victim of incest to report to either a public authority or a public health service within 72 hours from the time the victim is advised of her pregnancy to qualify for public funding of an abortion. The Commonwealth Court found these provisions to be unconstitutional, violating the right to privacy guaranteed under article I, section 1 of the Pennsylvania Constitution. *Id.*

was provided to her. The Supreme Court, in *Planned Parenthood v. Casey*,¹⁶ held the informed consent provisions of ACA that required giving truthful, non-misleading information about the nature of abortion and of childbirth and about probable gestational age of the fetus did not impose an undue burden on the woman's right to choose to terminate her pregnancy.¹⁷

3. Parental Consent - § 3206 requires that one parent or guardian provide consent for a minor unless authorization is secured from the court. The statute sets forth the procedure to be followed to obtain such authorization. Like the informed consent provision, the parental consent section was deemed proper and not an undue burden on the minor woman's abortion decision.¹⁸

4. Spousal Notice - § 3209 requires the woman to provide a signed statement that she has notified her husband she is about to undergo an abortion. Exceptions have been carved out where the husband is not the father of the child; the husband cannot be located; the pregnancy is the result of spousal sexual assault; the woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another person; and in case of medical emergency. In 1992, the *Casey* Court struck down this section as an undue burden on a woman's constitutional right.¹⁹

5. Abortions Past 24 Weeks - § 3211 prohibits abortions once the gestational age of the unborn child is 24 or more weeks unless to prevent the death or substantial and irreversible impairment of a major bodily function of the woman. However, an abortion is not authorized if performed on the basis of a claim or diagnosis that the woman will engage in conduct which would result in her death or impairment.

6. In Vitro Fertilization - § 3213(e) requires quarterly reporting by establishments who conduct or experiment in *in vitro* fertilization and make records available for inspection. This

¹⁶ 505 U.S. 833 (1992).

¹⁷ In so ruling, the Supreme Court overruled *Akron v. Akron Cent. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) and *Thorburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

¹⁸ 505 U.S. 833 (1992).

¹⁹ *Id.*

section further provides that all establishments who are non-exclusive abortion providers must prominently post a notice entitled “Right of Conscience,” for the exclusive purpose of informing medical personnel, employees, agents, and students of such facilities of their rights under the statute. In interpreting this section, the ACA was deemed not to violate religious freedom guaranteed by the First Amendment by discriminating among religions simply because it took measures, with its state’s powers, to regulate the practice of abortion.²⁰

7. Fetal Experimentation - § 3216 prohibits any type of nontherapeutic experimentation or procedure upon any unborn child, or upon any child born alive during the course of an abortion.²¹

Protection of the Unborn from Criminal Violence

While in many states, protection of the unborn child commences at viability, or in some states ‘quickening,’ Pennsylvania is one of twenty-three states to have enacted legislation punishing third parties for killing an unborn child from the point of conception.²²

In the 2001 *Commonwealth v. Booth*²³ case, the Pennsylvania Supreme Court considered the dismissal of murder charges filed against a drunk driver who had collided with a woman in her thirty-second week of pregnancy, killing her unborn child.²⁴ Because of the absence of law protecting an unborn child at the time of the accident, the Supreme Court determined the only conclusion was no crime had been committed against the unborn child. This was so despite the Court’s acknowledging “it is understood that a mother and her unborn child are separate and distinct entities.”²⁵

²⁰ Am. Coll. of Obstetricians and Gynecologists v. Thornburgh, 552 F.Supp. 791 (D. Pa. 1982).

²¹ There is currently no case law interpreting this section of the statute.

²² Amy Lotierzo, *The Unborn Child, A Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279, 287 (2006).

²³ 766 A.2d 843 (Pa. 2001).

²⁴ *Id.*

²⁵ *Id.* at 241 (citing *Sinkler v. Kneale*, 164 A.2d 93, 96 (Pa. 1960)).

Three months after the accident giving rise to *Booth*, the Pennsylvania Legislature passed the Crimes Against the Unborn Child Act (CAUCA), which provides that “an individual commits criminal homicide of an unborn child if the individual intentionally, knowingly, recklessly or negligently causes the death of an unborn child in violation of section 2604 (relating to murder of unborn child) or 2605 relating to voluntary manslaughter of unborn child.”²⁶ Criminal homicide of an unborn child is classified as murder of an unborn child or voluntary manslaughter of an unborn child.²⁷

An important exemption in the CAUCA is expressly carved out for the mother of the unborn child; criminal prosecution against her for crimes against her child are prohibited.²⁸ In perhaps the best example of the unborn child’s still holding second-class status in Pennsylvania, the first-degree murder of an unborn child is *not* punishable by death, unlike the killing of a born person.²⁹ The Court’s hands will no doubt remain bound until the people elevate unborn child to a status level with adults.

In *Commonwealth v. Edwards*,³⁰ the defendant was convicted in a jury trial of first degree murder, second-degree murder of an unborn child, criminal attempt to commit homicide, arson, and burglary and was sentenced to death. The defendant appealed from the judgment of the sentences imposing death for each of three first-degree murder convictions and lesser sentences for the second-degree murder of an unborn child and other offenses. The Supreme Court affirmed the judgment, finding none of the alleged discrepancies in the prosecution’s notice of aggravating factors for a sentence of death.

²⁶ 18 PA. CONS. STAT. § 2603.

²⁷ *Id.*

²⁸ 18 PA. CONS. STAT. § 2608. The Supreme Court of Pennsylvania has not attempted to extend its laws like the South Carolina Supreme Court did when that court permitted criminal prosecution against the mother of child born with cocaine metabolites in his system. *See Whitner v. State*, 492 S.W.2d 777 (S.C. 1997).

²⁹ 18 PA. CONS. STAT. § 1102(a)(2).

³⁰ 903 A.2d 1139 (Pa. 2006).

In a similar case, the defendant was convicted of voluntary manslaughter after killing his pregnant girlfriend.³¹ He appealed the conviction, arguing among other things that CAUCA failed to include a viability element, rendering it unconstitutionally vague, as no jury would be able to determine when the act of the defendant caused the death of the unborn child. The Superior Court upheld the conviction.³² In affirming, the Supreme Court explained that

by defining unborn child to include all stages of gestation, the General Assembly intended to eliminate any viability requirement. . . . Moreover, as appellate courts in other jurisdictions have elaborated in construing similar feticide enactments, the statutory language does not purport to define the concept of personhood or establish when life as a human being begins and ends; rather, it imposes criminal liability for the destruction of a human embryo or fetus that is biologically alive. *See, e.g., State v. Merrill*, 450 N.W.2d 318, 324 (Minn. 1990) (“People are free to differ or abstain on the profound philosophical and moral questions of whether an embryo is a human being, or on whether or at what stage the embryo or fetus is ensouled or acquires ‘personhood.’ These questions are entirely irrelevant to criminal liability under the statute”).³³

The *Bullock* Court concluded that, in this context, death occurred when the embryo or fetus ceased to have the properties of life.

A wrongful death action may be brought on behalf of a fully developed stillborn fetus as a civil matter.³⁴ The Pennsylvania Supreme Court has ruled that for purposes of civil liability, a “person” is a viable fetus or one capable of taking a breath outside the mother’s womb.³⁵

³¹ *Commonwealth v. Bullock* 868 A.2d 516 (Pa. Super. Ct. 2005), *aff’d*, 913 A.2d 207 (Pa. 2006).

³² *Id.* The Court explained that:

“[t]oday it is understood that a mother and her unborn child are separate and distinct entities, and that medicine is generally able to prove the corpus delicti of the homicide of an unborn child.” As always, the burden of proving beyond a reasonable doubt this causation element is on the Commonwealth. Clearly, a death occurs when the embryo or fetus no longer has the capacity to thrive or grow. *See* WEBSTER’S NEW COLLEGIATE DICTIONARY 289 (8th ed. 1981) (defining death as “a permanent cessation of all vital functions”). When an act of the defendant has caused the death, he may be held criminally liable.”

³³ *Commonwealth v. Bullock*, 913 A.2d 207 (Pa. 2006).

³⁴ *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985).

Assisted Suicide

Pennsylvania does not condone, authorize, or approve mercy killings, euthanasia, or aided suicide, nor does it permit any affirmative or deliberate act or omission to end life, except as permitted by law.³⁶ It does, however, recognize a distinction between death that comes to a terminally ill individual when life-sustaining systems are terminated but that actually results from the underlying disease and death resulting from self-destructive acts that would constitute suicide.³⁷ Thus, the withholding or withdrawal of life-sustaining treatment from a qualified patient in accord with the provisions of the Advance Directive for Health Care Act,³⁸ for any purpose, does not constitute suicide or homicide.³⁹

The courts have ruled the Commonwealth is interested in protecting its citizens against acts that endanger their lives. The policy of the law is to protect human life, even the life of a person who wishes to destroy his own.⁴⁰

³⁵ *Hudak v. Georgy*, 634 A.2d 600 (Pa. 1993). The Court has ruled that wrongful death and survival acts do not create a cause of action for non-viable fetuses. *Covelski v. Bubnis*, 634 A.2d 608 (Pa. 1993).

³⁶ 20 PA. CONS. STAT. § 5402(b). In 1992 the enacted the “Advance Directive for Health Care Act” in 1992. 20 PA. CONS. STAT. §§ 5401-5416. In addressing the legislative findings and intent of the Act. Section 5402 provides in pertinent part:

(a) The general finds that all competent adults have a qualified right to control decisions relating to their own medical care. This right is subject to certain interest of society, such as maintenance of ethical standards in the medical profession and the preservation and protection of human life ...

(b) Nothing in this chapter is intended to condone, authorize or approve mercy killing, euthanasia or aided suicide or to permit any affirmative or deliberate act or omission to end life other than as defined in this chapter . . .”

³⁷ *In re Jane Doe*, 45 Pa. D. & C. 3d 371 (Pa. C. P. 1987).

³⁸ 20 PA. CONS. STAT. §§ 5401–16.

³⁹ 20 PA. CONS. STAT. § 5410(a).

⁴⁰ *Commonwealth v. Luczak*, 29 Pa. D. & C.4th 401 (Pa. D. & C. 1995) (citing *Commonwealth v. Root*, 156 A.2d 895, 900 (Pa. Super. Ct. 1959), *rev'd on other grounds*, 170 A.2d 310 (Pa. 1961)).

Guided by the Superior Court's language in *Commonwealth v. Root*⁴¹ and the legislative intent of the Advance Directive for Health Care Act, it is clear the law of Pennsylvania does not recognize an all-encompassing right to die such that the criminal statute which prohibits causing or aiding suicide is rendered unconstitutional. To the contrary, the Pennsylvania Constitution speaks to a right to enjoy and defend life.⁴²

Healthcare Rights of Conscience

The Abortion Control Act provides it is the policy of the Commonwealth of Pennsylvania to respect and protect the right of conscience of all persons who refuse to obtain, receive, subsidize, accept or provide abortions including those persons who are engaged in the delivery of medical services and medical care.⁴³

Stem Cell Research and Cloning

The ACA requires all persons conducting or experimenting with *in vitro* fertilization to file quarterly reports with the State.⁴⁴ The law, however, does not directly address the discarding of preembryos. As long as IVF patients wish to have their embryos discarded, clinics will comply. Reading the ACA in conjunction with the CAUCA regarding the legal status of embryos yields a consistent result. The *Booth* case suggests that, in order for crimes to be committed against an unborn child, the child must be in the womb of the mother, reinforcing the viability bright line.

The Pennsylvania courts have not yet considered the issues of human cloning or destructive embryo research.

The Supreme Court of Pennsylvania appears to be pro-life without being pro-active, as discussed in the next section. Strides have been made to address and blunt the effect of *Roe*

⁴¹ *Commonwealth v. Root*, 577 Pa. 716 (Pa. 2004). [CAN'T FIND THIS ON LEXIS.]

⁴² *Luczak*, 1995 Pa. Dist. & Cnty. Dec. LEXIS 59.

⁴³ 18 PA. CONS. STAT. § 3202(d). There is currently no case law interpreting this section of the statute.

⁴⁴ 18 PA. CONS. STAT. § 3213(e).

through legislative action,⁴⁵ but the Court remains restrained and is not a leader among its peers regarding life issues. As it goes through this time of fluctuation, and new members are added to the Court, a clearer identity will emerge in coming years.

II. JUDICIAL RESTRAINT

The Supreme Court recognizes Pennsylvania is a Code jurisdiction, meaning it is not empowered to create law, but rather its duty is to interpret the laws passed by the Legislature.⁴⁶ “To preserve the delicate balance critical to the proper functioning of a tripartite system of government, the Supreme Court has exercised judicial restraint to avoid an intrusion upon the prerogatives of a sister branch of government.”⁴⁷ The Court has explained that

The strong presumption of constitutionality enjoyed by acts of the General Assembly and the heavy burden of persuasion on the party challenging an act have been so often stated as to now be axiomatic. Legislation will not be invalidated unless it clearly, palpably, and plainly violates the Constitution, and any doubts are to be resolved in favor of a finding of constitutionality.⁴⁸

The Pennsylvania Supreme Court follows the Enrolled Bill Doctrine, which provides that

When a law has been passed and approved and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage. . . . The presumption in favor of regularity is essential to the peace and order of the state. While the Enrolled Bill Doctrine operates as an appropriate means of judicial restraint to avoid intrusion by the judiciary into the prerogatives of a co-equal branch of government, the legitimacy of such abstention is dependent upon the situation presented.⁴⁹

⁴⁵ 410 U.S. 113 (1973).

⁴⁶ *Commonwealth v. Booth*, 766 A.2d 843, 851 n.14 (Pa. 2001).

⁴⁷ *Common Cause/Pa. v. Commonwealth*, 710 A.2d 108, 116 (Pa. Commw. Ct. 1998).

⁴⁸ *Pa. Liquor Control Bd. v. Spa Athletic Club*, 485 A.2d 732, 735 (Pa. 1984); *see also Pa. AFL-CIO v. Commonwealth*, 691 A.2d 1023, 1031 (Pa. Commw. Ct. 1997).

⁴⁹ *Common Cause/Pa.*, 710 A.2d at 116.

However, the Supreme Court has been charged with a mandate “to insure that government functions within the bounds of constitutional prescription.”⁵⁰ The Supreme Court has stated that, while due deference to a co-equal branch of government is appropriate where it is functioning within constitutional constraints, it would be a serious dereliction to deliberately ignore a clear constitutional violation.⁵¹ Where the facts are agreed upon and the question presented is whether or not a violation of a mandatory constitutional provision has occurred, judicial intervention in the legislative process is warranted.⁵²

The Pennsylvania Supreme Court has also relied upon the Political Question Doctrine. This doctrine, derived from the principle of separation of powers,

recognizes that the executive branch, the Legislature and the judiciary are independent, co-equal branches of government. Each of the three branches have powers and duties upon which neither of the other two branches may intrude. Pursuant to this doctrine, the courts will not review the actions of another branch of government where the Constitution entrusts those actions to that other branch. Ordinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers. However, where our Constitution confers a power exclusively upon the Legislature, any challenge to the Legislature's exercise of that power presents a nonjusticiable political question. But whether a power has been vested in another branch of government is an "exercise in constitutional interpretation."⁵³

In its very telling *Booth* opinion, the Supreme Court of Pennsylvania held an unborn child could not be the victim of the offense of homicide by vehicle while driving under the influence. The Legislature did not intend for the term "person," as used in the statute setting forth the offense, to include a fetus. The Supreme Court further explained it was for the Legislature, not the courts,

⁵⁰ *Consumer Party of Pa. v. Commonwealth*, 510 Pa. 158, 177 (Pa. 1986)

⁵¹ *Common Cause/Pa.*, 710 A.2d 108. [*PINCITE?*]

⁵² *Id.*

⁵³ *Sweeney v. Tucker*, 375 A.2d 698 (Pa. 1977) (citations omitted).

to abolish the "born alive" rule, under which only human beings born alive are independent persons within the meaning of the law. The enactment of the Pennsylvania Abortion Control Act did not abrogate the "born alive" rule.

The *Booth* Court explained that

Such public importance requires that, at the outset, we make clear the nature, and the consequent limitations, of our review. As the Supreme Court of Illinois observed, in a decision addressing substantially the same issue, “[t]he extent to which the unborn child is to be accorded the legal status of one already born is one of the most debated questions of our time. . . .” Two decades later, the debate continues. Weighing the substantive merits of the various positions in that debate is no part of our role in this matter. Rather, our role is to ensure that the issue before us is resolved in accordance with the settled principles that guide the criminal jurisprudence of this Commonwealth.⁵⁴

Thus, the Supreme Court of Pennsylvania strictly interprets Pennsylvania’s constitution and statutes. It has explained that “when the judiciary is required to resolve an issue concerning the elements of a criminal offense, its task is fundamentally one of statutory interpretation, and its overriding purpose must be to ascertain and effectuate the legislative intent underlying the statute.”⁵⁵

The *Booth* Court went so far as to scold the superior court for its judicial activism in arriving at its own conclusion by extending the rationale from the civil realm to the criminal realm.⁵⁶ Despite the superior court’s conclusion that the “time had come for the criminal justice

⁵⁴ Commonwealth v. Booth, 766 A.2d 843 (Pa. 2001) (citing *People v. Greer*, 402 N.E.2d 203, 208 (Ill. 1980)).

⁵⁵ *Id.* (citing 1 PA. CONN. STAT. § 1921(a); Commonwealth v. Fisher, 485 Pa. 8, 12, (1979)).

⁵⁶ “Early in its opinion, the Superior Court majority acknowledged that its resolution of the matter at issue was to be guided by the principles of interpretation generally applied to criminal statutes. The court’s consideration of those principles was minimal, however; the determining factor in its resolution of the issue before it was the perceived desirability of extending the rationale of *Amadio* from the civil to the criminal law. In the court’s view, “the time had come” for the criminal justice system to expand its interpretation of the term “person” to encompass unborn children. We are unable to accept this reasoning, since determining whether the intended for the term “person” as used in Section 3735 to include a fetus should have been, but was not, the lodestar of the Superior Court’s analysis.” *Booth*, 766 A.2d at 846–47.

system to expand its interpretation of the term ‘person’ to encompass unborn children,” the Supreme Court resisted any impulse to exceed the clear intent of the Legislature.⁵⁷

The Supreme Court remains aware that the Commonwealth is a Code jurisdiction and it has not been charged with creating law, but merely interpreting it.⁵⁸ in order preserve the delicate balance between co-equal branches.⁵⁹

III. THE COURT

The Pennsylvania Supreme Court consists of seven justices, each elected to ten year terms. Supreme court judicial candidates may run on party tickets. The justice with the longest continuous service on the supreme court automatically becomes chief justice.

Prior to 2002, judicial candidates in Pennsylvania were prohibited from expressing their views on disputed legal or political issues. But after a similar law in Minnesota was struck down as unconstitutional,⁶⁰ the Pennsylvania rules were amended, and judicial candidates may now express political viewpoints as long as they do not “commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”⁶¹

After the ten year term expires, a statewide Yes/No vote for retention is conducted. If the judge is retained, he/she serves another ten year term. If the judge is not retained, the Governor, subject to the approval of the state senate, appoints a temporary replacement until a special election can be held.

As of 2005, only one judge has failed to win retention. Justice Russell M. Nigro received a majority of "No" votes in the election of 2005 and was replaced by Justice Cynthia A. Baldwin,

⁵⁷ *Id.*

⁵⁸ *Booth*, 766 A.2d at 851 n.14 (Pa. 2001).

⁵⁹ *Common Cause/Pa. v. Commonwealth*, 710 A.2d 108, 116 (Pa. Commw. Ct. 1998).

⁶⁰ *Minnesota v. White*, 536 U.S. 765 (2002).

⁶¹ PA. CODE OF JUDICIAL CONDUCT 7(B)(1)(c).

who was appointed by Democratic Governor Rendell. In addition, Justice Newman, who garnered only 54% of her retention vote, resigned on December 31, 2006. Pundits have opined that Justices Nigro and Newman’s fates were directly related to a recent legislative pay hike and the Supreme Court’s refusal to review it. In an off-year election cycle, the voters lashed out at Nigro and Newman simply because their names were the only meaningful ones on the ballot.

Biographical Information of Current Members of the Supreme Court of Pennsylvania

Member⁶²	Appointed by / Year	Term Expires	Miscellaneous
Ralph J. Cappy, Chief Justice	Elected/ 1989 Retained/ 1999 Appointed Chief Justice/ 2003	2013	-Biographical information: B.S. in Psychology and his J.D. from the University of Pittsburgh; Served as public defender in Allegheny for 10 years -Professional/social affiliations: Democrat;

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⁶³ Justice Cappy stated: "I have great trepidation about the majority opinion in that case. I certainly am an ardent defender of the First Amendment; however, I think judicial elections are a bit of a different breed than legislative and executive-branch elections." In Cappy's view, "the judiciary is an institution that doesn't necessarily—and shouldn't—react to an immediate public sentiment. Ours is the cautious view. Our responsibility is to take a hard look, a deep, thoughtful look at changing times to see whether or not, in the long term, these changes are just a blip on the radar screen or something that is truly needed for the long-term growth and well-being of the state." *Facing the Future Pennsylvania's New Chief Justice, Ralph J. Cappy, Talks about the Prospects of a Unified Judiciary, the Evolving Challenges of Legal Practice, the Workings of Judicial Elections and Why He Likes Motorcycling*, PA. LAW. May-June 2003, at 12, 15.

⁶⁴ In this article, Justice Cappy discusses ballot initiatives in various states that were designed to make courts more accountable. Justice Cappy was pleased that most initiatives were defeated and concluded: "It is vitally important that the courts everywhere in America remain accountable yet strong and independent, as they have for more than 200 years, and that judges remain free to make decisions based on the rule of law, and that alone, uninfluenced by any form of outside pressure."

⁶⁵ Chief Justice Cappy, who spends summers riding a motorcycle cross-country, defies easy categorization as liberal or conservative; nonetheless, he has remained a consistent voice in favor of independent analysis under the state constitution. He has authored an impressive collection of opinions rooted firmly in the Pennsylvania Constitution and has used his bully pulpit as chief justice to advocate the careful development of state constitutional jurisprudence by lawyers and judges throughout the commonwealth. Ken Gormley, *The Forgotten Supreme Court Justices*, 68 ALB. L. REV. 295, 299–300 (2005).

			<p>1992-present, chair, Board of Trustees, University of Pittsburgh; 1995-present, chair, Board of Visitors.</p> <p>-Notable opinions: When asked about the <i>Minnesota v. White</i> decision, Cappy expressed great trepidation about allowing candidates to reveal their party affiliation;⁶³</p> <p>-Articles: <i>Where Courts Were Under Threat, Voters Made Sound Choices</i>, 8 NO. 25 <i>Lawyers J. 5 Lawyers Journal</i> December 8, 2006;⁶⁴ <i>Collaborative Effort Leads to Newly Enacted Compensation System</i> 7 NO. 18 <i>Lawyers J. 6 Lawyers Journal</i> September 2, 2005; <i>Unforgettable Character: Chief Justice Remembers Hon. George H. Ross</i>, 6 NO. 23 <i>Lawyers J. 8 Lawyers Journal</i> November 12, 2004</p> <p>-Judicial evaluations: Pennsylvania Constitutional Scholars have commented that Justice Cappy cannot be easily pegged as either a conservative or liberal jurist.⁶⁵</p>
Ronald D. Castille	Elected/ 1993	2014	<p>-Biographical information: Commissioned lieutenant in the U.S. Marines and medically retired due to severe wounds suffered in combat in Vietnam; B.S. in economics from Auburn University; J.D. from the University of Virginia; Career prosecutor for 20 years, first as an assistant district attorney and later as District Attorney of Philadelphia; Ran as the Republican candidate for Mayor of Philadelphia in 1991 (lost).</p> <p>-Professional/social affiliations: Republican; 1992-present, Pennsylvania Advisory Committee of the United States Commission on Civil Rights; 1993-present, Board of Directors, National Alliance for Model State Drug Laws; 1994-present, liaison justice to Ad Hoc Committee on Evidence; 1994-present, liaison justice to Criminal Procedural Rules Committee; 1994-present, liaison justice to Minor Court</p>

			<p>Rules Committee.</p> <p>-Articles: <i>Foreword: A Period of Restoration and Reform</i>, 67 Temp. L. Rev. 509 Temple Law Review, Pennsylvania Courts Review.⁶⁶</p>
Sandra S. Newman	Elected/ 1995	2006	<p>-Biographical information: B.S., Drexel University, 1959; M.A., Temple University, 1969; J.D., Villanova Law School, 1972; First woman elected to the Court; After garnering only 54% of the retention vote in the last election, Justice Newman retired on 12/31/2006 despite being elected in November 2005; Her departure means that Democratic Governor (and former mayor of Philadelphia) Ed Rendell will appoint an interim justice; Voters will elect her permanent replacement, as well as a replacement for another justice, in the Fall of 2007.</p> <p>-Professional/social affiliations: Republican; 1982-present, Board of Consultors, Villanova University Law School; 1992-present, member, Advisory Board of Drexel University College of Business and Administration; 1998-present, chairman, Judicial Council of the Supreme Court of Pennsylvania; 1998-present, chairman, the Unification of Statewide Rules Committee; 1999-present, master, J. Willard O'Brien Inn of Court; 2002-present, Executive Board of Trustees, Drexel University College of Medicine; 2002-present, chairman, Judicial Council of Pennsylvania's Committee on Judicial Safety and Preparedness; 2002-present, liaison to First Judicial District of Pennsylvania.</p>

⁶⁶ In this article, Justice Castille discussed new disciplinary rules regarding the judiciary in light of the impeachment of Justice Larsen.

Thomas G. Saylor	Elected/ 1997	2007	<p>-Biographical information: B.A., University of Virginia; J.D., Columbia University; LLM, University of Virginia; Served as an assistant district attorney; Appointed to be the Director of Pennsylvania's Bureau of Consumer Protection, and First Deputy Attorney General from 1983 to 1987</p> <p>-Professional/social affiliations: Republican; Elected Superior Court Judge in 1993; American Bar Association, Appellate Judges Conference; Pennsylvania Bar Association; Cumberland County Bar Association; Dauphin County Bar Association; member, American Law Institute; member, Board of Overseers, Widener University School of Law.</p> <p>-Articles: <i>Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule</i>, 59 N.Y.U. Ann. Surv. Am. L. 283; <i>Post Conviction Relief in Pennsylvania</i>, 69 Pa. B.A. Q. 1, Pennsylvania Bar Ass'n Quarterly January 1998; <i>Policing Auto Repair Services Under Pa. Law</i>, 64 Pa. B.A. Q. 42, January 1993</p>
J. Michael Eakin	Elected/ 2001	2010	<p>-Biographical information: B.A. in government, Franklin & Marshall College; J.D., Dickinson School of Law; Assistant district attorney for eight years, then spent a decade in private practice, before serving as Cumberland County District Attorney for nine years; Elected as Superior Court in 1995 before being elevated to the Supreme Court in 2000, running as a Republican candidate</p> <p>-Professional/social affiliations: Republican; Cumberland County Bar Association; Dauphin County Bar Association; Lancaster County Bar Association; American Bar Association; Pennsylvania Bar Association.</p> <p>-Noteworthy opinions: In 1990, he</p>

			<p>successfully argued before the United States Supreme Court (<i>Pennsylvania v. Muniz</i>).</p> <p>-Articles: <i>The Appellate Judge’s Reply Brief, with apologies to both Poe & Laura I Appleman, Esq.</i>, 8 Green Bag 2d 435 Green Bag Summer 2005 Ex Post; <i>What An Advocate Can Learn from Springsteen</i>, 14 Widener L.J. 743 Widener Law Journal 2005 Symposium;</p> <p><i>Making the Grade: Trying to make sense out of grading criminal offenses sometimes can be just that—trying</i> 16-JUL Pa. Law. 30 Pennsylvania Lawyer July, 1994</p> <p>-Judicial evaluations: Known for his penchant for writing opinions in verse, Justice Eakin “has resisted using the state constitution to expand rights of the criminally accused (much like his colleague Justice Castille); yet, he has remained intellectually open to Pennsylvania constitutional debate.”⁶⁷</p>
Max Baer	Elected/ 2003	2013	<p>-Biographical information: B.A., University of Pittsburgh; J.D., Duquesne University; Deputy Attorney General and spent some time in private practice before being elected to the Allegheny County Court of Common Pleas; Deeply involved in family and child issues, as exemplified by various awards; Recognized as a leader on family law issues. He is a self-described “administratively activist judge”;⁶⁸</p> <p>-Professional/social affiliations: Democrat; Former chair, Domestic Relations Procedural Rules Committee; <i>Ex Officio</i> Representative to the Juvenile Court Judges Commission; Former Member, Joint State</p>

⁶⁷ Gormley, *supra* note 66, at 302.

⁶⁸ Geoff Yuda, *New to the Court: Justice Max Baer, the Newest Member of Pennsylvania's Supreme Court, Discusses the Electoral Process, What He Hopes to Accomplish and Life Off the Bench*, PA. LAW., May-June 2004, at 40, 43.

			<p>Government Commission on Adoption Law and Services to Children and Youth; Former Chair, Pennsylvania Conference of Trial Judges Family Law Section; Former Member, Conference's Education Committee.</p> <p>-Awards: Adoption Advocate of the Year, Pennsylvania Department of Public Welfare (1997); Adoption 2002 Excellence Award for Judicial Innovation, Federal Department of Health and Human Services (1998); Robert S. Steward Award for Distinguished Service to Pennsylvania Families (1998); Child Advocacy Award for Legal Contributions Advancing the Welfare of our Nation's Children (1999); Child Advocate of the Year, Pennsylvania Bar Association (2000); Champion of Children's Award, Homeless Children's Education Fund (2003).</p>
Cynthia A. Baldwin	Governor E.G. Rendell/ 2005	2008	<p>-Biographical information: B.A. in English, Penn State University; J.D., Duquesne University; Served as an assistant district attorney and law professor at Duquesne University; Elected to the Allegheny County Court of Common Pleas in 1990; Only second woman elected to the Supreme Court;⁶⁹ It has been reported that Justice Baldwin's nomination would not have passed the Senate had she not agreed to not run for a 10-year term in November 2007</p> <p>-Professional/social affiliations: Democrat; 2003-present, Penn State Alumni Association, lifetime member; 1983-present, Advisory Board, Penn State, McKeesport; 1990-present, Pennsylvania Bar Association; 1990-present,</p>

⁶⁹ Among other articles, she published *Avoiding Abuse, (of and under state and federal acts)*, PITTSBURGH LEGAL J., Dec. 1994, at 1,.

			Pennsylvania Conference of State Trial Judges; 1993-present, Homer s. Brown Law Association; 2002-present, International Association of Women Judges. -Articles: <i>Avoiding Abuse, (of and under state and federal acts)</i> , Pittsburgh Legal Journal, p. 1, December 1994.
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CONCLUSION

With the recent changes to the rules, the landscape may undergo serious change in the coming years. Candidates for the Supreme Court will have to carefully consider whether it is in their best interest to express political viewpoints⁷⁰ and place themselves on the same playing field as members of the Legislature.

⁷⁰ PA. CODE OF JUDICIAL CONDUCT 7(B)(1)(c).