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Joan Biskupic

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The Alito/O'Connor Switch

Joan Biskupic*

There are many factors that define the current Roberts Court, not the least of which is the dominant personality and determined approach of the Chief Justice himself. But a close second, or even arguably the leading determinant of the Court's current direction, is the replacement of Sandra Day O'Connor with Samuel Alito in January 2006.¹ And my task today is to look at some of the cases that are freshest from the recent Term that show the consequences of this succession.

The Justice O'Connor who I will be using for a point of comparison with Justice Alito is not the freshman jurist who was appointed in 1981 by Ronald Reagan² and who, in her early years, was more aligned with Chief Justice Warren Burger and William Rehnquist.³ Rather, I will be focusing, for purposes of these key recent cases, on the Justice O'Connor who moved to the left over time and who, in the end, controlled the Court.⁴

That distinction may not be so important in some areas of the law, but it is definitely crucial in the statutory and constitutional issues that were so important in the recently completed Term. It is also a reminder that Justice

* Author and Supreme Court reporter for the *USA Today*.

1. See Joan Biskupic, *Contrast Obvious Between O'Connor, Would-Be Successor*, USA TODAY, Nov. 1, 2005, available at http://www.usatoday.com/news/washington/2005-11-01-alito-oconnor_x.htm (highlighting the differences between Justices Alito and O'Connor on issues such as the Family and Medical Leave Act).

2. JOAN BISKUPIC, SANDRA DAY O'CONNOR—HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 70-98 (2005) (describing the events that led to Justice O'Connor's appointment to the Court by President Reagan).

3. See, e.g., *Enmund v. Florida* 458 U.S. 782, 801-31 (1982) (O'Connor, J., dissenting, joined by Burger, C.J., Powell & Rehnquist, JJ.); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 446-75 (1983) (Burger, C.J., dissenting, joined by Powell, Rehnquist & O'Connor, JJ.); *Barclay v. Florida*, 463 U.S. 939, 941-58 (1983) (Rehnquist, J., opinion, joined Burger, C.J., White & O'Connor, JJ.); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (O'Connor, J., concurring in judgment, joined by Burger, C.J., Powell & Rehnquist, JJ.); see also BISKUPIC, *supra* note 2, at 160 ("In her early voting, [O'Connor] had been in step with Burger and Rehnquist, so much so that *Time* magazine dubbed her Rehnquist's 'Arizona twin.'").

4. See BISKUPIC, *supra* note 2, at 160, 180-81 (detailing O'Connor's gradual move toward the center during her time on the Court); see also Joan Biskupic, *O'Connor Kept Court to the Center*, USA TODAY, July 4, 2005, available at http://www.usatoday.com/news/washington/2005-07-04-oconnor-legacy_x.htm (outlining 5-4 decisions of the Court where Justice O'Connor's vote was decisive in determining the holding).

Alito is still a freshman jurist, and his views and approach may shift over time. Now, I do not believe they will shift to the extent that happened with Justice O'Connor. But I do want to mention that Justices can change over time.

Overall, Justice O'Connor's approach was pragmatic and influenced by her political years in the West.⁵ As I like to say, Justice O'Connor came to Washington knowing how to count votes.⁶ She became a consensus seeker on the Court.⁷ She developed an incremental approach, taking her cues from the country and pushing it ever so slightly.⁸

Justice Alito's points of reference are more purely in the judicial realm. Interestingly, of all the current Justices, he had served the longest on a lower federal court before being elevated to the Supreme Court. He tallied up sixteen years as a United States appellate court judge,⁹ a longer tenure than any of the other eight sitting Justices, all who were promoted from an appeals court.¹⁰

Before I address some of the substantive legal differences between Justices O'Connor and Alito, I want to mention something more stylistic for those of you who do not get a chance to attend oral arguments as I do.

During the oral arguments, a striking similarity between these two Justices is emerging. Justice Alito was fairly quiet during his first year. As many of you know, the Justices sit by seniority so he is off to the far right next to Justice Ruth Bader Ginsburg.¹¹ It is a seat off from the fray. Yet Justice Alito also seemed to have intentionally refrained from some of the most heated give-and-take during his first Term.

He since has become much more of a presence. I have to say that he has shown a very probing and practical approach in his queries from the bench now. That was evidenced, I think, most recently in the two criminal sentencing cases that we heard involving how appeals court judges should

5. BISKUPIC, *supra* note 2, at 22-69 (describing Justice O'Connor's time in Arizona political life before coming to the Supreme Court, including her positions as assistant state attorney general, state senator and majority leader, and finally state court judge); see also Joan Biskupic, *With O'Connor Retiring, Focus Turns to Possible Successor*, USA TODAY, July 1, 2005, available at http://www.usatoday.com/news/washington/2005-07-01-oconnor-retirement_x.htm (detailing life of Justice O'Connor).

6. BISKUPIC, *supra* note 2, at 334.

7. *Id.*

8. *Id.* at 278, 287, 317, 334.

9. The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Jan. 15, 2008).

10. *Id.*

11. *Introduction to EIGHT MEN AND A LADY: PROFILES OF THE JUSTICES OF THE SUPREME COURT*, at 11 (1990); see also Bill Mears, *Notes on O'Connor, Mohammed and Falling Marble*, CNN Washington Bureau, Feb. 7, 2006, <http://www.cnn.com/2006/LAW/02/07/scotus.journal/index.html> ("[F]rom left to right, as one watches from the courtroom, the new lineup is: Justices Stephen Breyer, Clarence Thomas, Anthony Kennedy, John Paul Stevens, Chief Justice John Roberts, Justices Antonin Scalia, David Souter, Ruth Bader Ginsburg and Alito.").

review trial court judges' departures from the U.S. Sentencing Guidelines.¹² That was part of Justice Alito's job for more than a decade, before coming onto the Court. "This is not a hypothetical situation, really," Alito said during the arguments, as a lawyer representing a defendant protested Alito's premise that trial judges assessing similar facts often give different sentences.¹³

If you followed the *Stoneridge Investment* case¹⁴ that was heard two weeks ago, you would have noticed that he can be persistent as his predecessor, Justice O'Connor.¹⁵ "[D]idn't you allege exactly the opposite in your complaint?" Alito asked a lawyer about one point.¹⁶ The lawyer protested that he had not.¹⁷ "Well, I'm looking at paragraph 218 . . .," Alito said as he pulled out a filing.¹⁸ The lawyer tried to clarify his answer, but then—as happens in the hurly-burly of arguments—Justices Ginsburg and Antonin Scalia interrupted.¹⁹ A few minutes later Alito returned to his earlier point, "All right, just to be clear on this . . ."²⁰

As many of you know, the veterans on this bench certainly like to mix it up, and there is a lot of cross-talk and rapid-fire questioning. I think it is a testament to Justice Alito that he now is jumping in and becoming a real contributor to the Q and A. When I asked him about this, Justice Alito told me, "I did feel, as the newest justice, I should be deferential."²¹

In terms of the law of the land, Justice Alito has significantly made a difference on abortion and sex discrimination, and those are the two areas I have been asked to cover today. I will start with the shift on abortion.

When the Supreme Court upheld the federal ban on the procedure known as partial-birth abortion last Term, it was a different result from 2000

12. See *Kimbrough v. United States*, 128 S. Ct. 558 (2007); see also *Gall v. United States*, 128 S. Ct. 586 (2007).

13. Transcript of Oral Argument at 12, *Kimrough v. United States*, 128 S. Ct. 558 (2007) (No. 06-6330).

14. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2007).

15. Joan Biskupic, *Court Losing O'Connor's Unique Voice*, USA TODAY, Jan. 16, 2006, available at http://www.usatoday.com/news/washington/judicial/2006-01-16-court-oconnor_x.htm (noting O'Connor's relentless, no-nonsense approach to questioning during oral arguments).

16. Transcript of Oral Arguments at 13, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2007) (No. 06-43).

17. *Id.*

18. *Id.*

19. *Id.* at 14-16.

20. *Id.* at 16.

21. Joan Biskupic, *Alito Puts Rookie Year Behind, Gets a Few Words In*, USA TODAY, Oct. 31, 2007, at 10A, available at http://www.usatoday.com/news/washington/2007-10-31-alito_N.htm.

and simply a matter of one vote.²² O'Connor's vote was substituted by Alito's.²³ O'Connor had a crucial role on the Court regarding abortion rights. That was particularly evident seven years ago, the first time the Court took up the controversial procedure known as partial birth.²⁴ In that dispute, *Stenberg v. Carhart*, a Nebraska state ban on the procedure was at issue.²⁵ As some of you might remember, most of the states—thirty—had a similar ban on the procedure in effect in 2000.²⁶ O'Connor cast the key fifth vote to strike down state bans and wrote a concurring opinion that raised the possibility that governments could craft a constitutional ban of this procedure.²⁷ But she said there would have to be an exception for the mother's health.²⁸

Now, when the Court took up the new partial ban in the last Term—the federal one—it was a statute that was more similar than different to what had been before the Justices in 2000.²⁹ It did not have a maternal health exception.³⁰ Interestingly, when the Justices held oral arguments in November 2006, Justice Alito did not say a thing.³¹ I think we all suspected where he might be coming from on the issue, but he did not tip his hand at all. In the end, of course, he made the difference.

The five-to-four decision in *Gonzales v. Carhart* departed from past abortion rulings by giving state legislatures more latitude to restrict abortion particularly when there is debate among physicians over the safety of procedures.³² The decision reinstating the federal partial-birth abortion ban likely will make it harder for challengers to go after any other federal legislation that emerges, particularly because Justice Kennedy, who wrote the opinion signed by Justice Alito, emphasized the authority of the federal government and the congressional hearings that led to the law.³³

The Court also emphasized the “bond of love” a mother has for a child, and said that some women come to regret abortion.³⁴ This was a very controversial part of Justice Kennedy's opinion. Justice Ginsburg, speaking

22. *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

23. *Compare Gonzales*, 127 S. Ct. at 1610, with *Stenberg v. Carhart*, 530 U.S. 914 (2000).

24. *Stenberg*, 530 U.S. at 947 (O'Connor, J., concurring); see also BISKUPIC, *supra* note 2, at 275-76.

25. *Stenberg*, 530 U.S. at 921-22 (majority opinion).

26. *Id.* at 977 (Kennedy, J., dissenting).

27. *Id.* at 947 (O'Connor, J., concurring).

28. *Id.* at 947-48.

29. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007).

30. *Id.* at 1635-36.

31. Transcript of Oral Argument at 1, *Gonzales*, 127 S. Ct. 1610 (No. 05-380).

32. *Gonzales*, 127 S. Ct. at 1635-37.

33. *Id.* at 1637.

34. *Id.* at 1634.

for the dissenting Justices, stressed women's autonomy.³⁵ She said that the majority was essentially invoking "ancient notions about women's place in the family and under the Constitution."³⁶ It is easy to believe that Justice O'Connor would have had similar objections.

I want to mention another abortion decision that Professor Kmiec had urged us to look at. That is the 2006 *Ayotte v. Planned Parenthood of Northern New England* case.³⁷ That dispute emerged just as the Rehnquist Court was closing and the Roberts Court was beginning. As you might remember, oral arguments occurred as President George Bush was shifting gears, withdrawing the name of Harriet Miers and nominating Samuel Alito to replace O'Connor. The decision came down around the time the Alito hearings were starting.

The Justices unanimously threw out a lower court ruling that had struck down a law mandating parental notification at least forty-eight hours in advance when a minor seeks an abortion.³⁸ The lower court had found that the New Hampshire law was flawed because it lacked an explicit exception for minors facing a health emergency.³⁹ However, the Justices, led by O'Connor, said that the lower court had acted too quickly.⁴⁰ And in her opinion, she said, "We do not revisit our abortion precedents today."⁴¹

Signing that unanimous ruling were Justice Ginsburg, at one end, and Justices Scalia and Thomas, at the other. That prompted some of the talk about this being a unanimous court and how there would be more consensus on the Roberts Court. But as we now know, it was an aberration.

The next area I will address is sex discrimination—another issue in which Justice Alito had a significant role. In the '80s and early '90s, Justice O'Connor tended to take a narrower view of federal anti-bias law, than she did toward the end of her tenure. She had never voted in a case exactly like the one brought by Lily Ledbetter against Goodyear,⁴² but I believe it is safe to say that by 2007, if she had remained on the Court, she would have voted with Ms. Ledbetter.

Justice Alito, as we all know, was on the other side. He cast the decisive vote and also wrote the opinion. The Court ruled that workers

35. *Id.* at 1641 (Ginsburg, J., dissenting).

36. *Id.* at 1649.

37. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

38. *Id.* at 323-24.

39. *Id.* at 325-26.

40. *Id.* at 330-31.

41. *Id.* at 323.

42. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

cannot sue for paycheck inequities that arise from race or sex discriminations that occurred years earlier.⁴³ The law at issue, Title VII, required pay grievances to be filed within 180 days of an employer's allegedly biased action.⁴⁴ The Court ruled that only actual pay setting decisions qualified as such action.⁴⁵

The Justices rejected the view previously endorsed by many lower courts, that the regular delivery of a paycheck could be a discriminatory action despite the amount of the check being based on prior years' pay.⁴⁶ In this case, Lily Ledbetter's pay over the years had turned out to be significantly lower than the male counterparts on the job.⁴⁷

The Court's decision diminished the ability of workers to challenge pay disparities. Justice Alito stressed in his opinion, one of his most important to date, that this short deadline of 180 days reflected "Congress' strong preference [in Title VII] for the prompt resolution of employment [claims]."⁴⁸ And he emphasized that this strict reading of the statute protects employers from being sued late in the game.⁴⁹ As you may be aware, Congress is in the midst of trying to reverse the decision.⁵⁰

Justice Ginsburg, who wrote for the dissenters,⁵¹ took the unusual step of reading part of her statement from the bench. Now envision this: Here was Justice Alito. He had just read a portion of his decision. He did it without fanfare or flair. He is one of the more mild-mannered folks up there. And then comes Justice Ginsburg, sitting right next to him. She starts talking about how wrong he was. It provided a somewhat awkward moment for them both, but a dramatic one for those of us in the spectator seats.

Justice Ginsburg said workers would now be left with the choice of suing early on, and bringing a less than fully baked case, or suing only when the pay gap was large enough to mount a winnable case and then getting cut off by the deadline.⁵²

I think it was a very important decision for Justice Alito, and it recalled an opinion he had written in his very first Term. Some of you might remember the *Burlington Northern & Santa Fe Railway v. White* case.⁵³ In his early months on the Court, Justice Alito was the lone concurrence

43. *Id.* at 2169.

44. *Id.* at 2166.

45. *Id.* at 2165.

46. *Id.* at 2172-74.

47. *Id.* at 2178 (Ginsburg, J., dissenting).

48. *Id.* at 2170-71 (majority opinion).

49. *Id.* at 2170.

50. Lilly Ledbetter Fair Pay Act of 2007, H.R. 2831, 110th Cong. (2007).

51. *Ledbetter*, 127 S. Ct. at 2178 (Ginsburg, J., dissenting).

52. *Id.* at 2186 n.9.

53. *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

separating himself from even Chief Justice Roberts and Justices Thomas and Scalia in analyzing Title VII remedies that prohibited bosses from retaliating against workers who claimed job bias.⁵⁴

In *Burlington Northern*, the Court sided fully with a forklift operator who had been transferred to a more arduous job after she complained about sexual harassment.⁵⁵ Justice Alito agreed with the full Court on this point; however, he separated himself from the eight other Justices by concluding the majority was instituting a standard that would not be very practical on the job.⁵⁶ Justice Alito wrote a separate opinion to this effect. I think this showed both his conservatism and his independence very early on.

In other areas, which will be raised this afternoon, he also made a significant difference. One place obviously was in the consolidated Kentucky and Seattle school district cases, where the Court undermined what Justice O'Connor wrote in the area of college admissions for diversity.⁵⁷ Justice Alito also likely controlled the outcome of a case that did not get as much attention, the five-to-four decision, *Schriro v. Landrigan*.⁵⁸ There, the Roberts Court rejected the appeal of an Arizona death row inmate who claimed that his trial lawyer was ineffective because he failed to pursue evidence of the defendant's background that might have led a jury to spare his life.⁵⁹ The conservative majority deferred to a United States District Court judge who said the man had gotten enough of a chance to put on any mitigating evidence and did not deserve a new hearing on his claim.⁶⁰

It is interesting to note that toward the end of her twenty-five year career, Justice O'Connor took a particular interest in the quality of representation in capital cases, often providing the fifth vote with the more liberal Justices to let a defendant argue an ineffective assistance of counsel claim.⁶¹

54. *Id.* at 2418 (Alito, J., concurring).

55. *Id.* at 2409, 2416 (majority opinion).

56. *Id.* at 2418, 2420-21 (Alito, J., concurring).

57. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No.1*, 127 S. Ct. 2738, 2746 (2007).

58. 127 S. Ct. 1933 (2007).

59. *Id.* at 1937-38.

60. *Id.* at 1938.

61. *Rompilla v. Beard*, 125 S. Ct. 2456, 2460 (2005); see also BISKUPIC, *supra* note 2, at 317-19 (explaining Justice O'Connor's evolution in thinking about the death penalty and her growing concern for correcting flaws in the capital punishment system, including inadequate representation); Erwin Chemerinsky, *The Future of Constitutional Law*, 34 CAP. U. L. REV. 647, 654-55 (2006).
