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OPENING ARGUMENT

The Case of Alito v. O'Connor

By [Stuart Taylor Jr.](#), *National Journal*  
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Most analysts predict (and I agree) that if confirmed, Judge **Samuel Alito** will be more conservative than Justice **Sandra Day O'Connor**, whom he would succeed on the Supreme Court. That's why O'Connor was practically begged to stay on by liberal Democratic senators such as **Barbara Boxer** of California and **Patrick Leahy** of Vermont; moderate Republican senators such as **Arlen Specter** of Pennsylvania and **Olympia Snowe** and **Susan Collins** of Maine; and liberal groups such as the National Organization for Women.

But amid the debate over Alito's writings and decisions, some of the most telling signs of a right-wing agenda have received too little attention.

Alito's critics have ignored evidence that his 15 years of precedent-respecting work as a judge tell more about him than a handful of memos that he wrote . . . more than 20 years ago.

**Affirmative action.** The judge has repeatedly blocked or crippled programs designed to protect blacks against the continuing effects of American apartheid. One decision, which struck down a school board's policy of considering race in layoff decisions, thwarted an effort to keep a few black teachers as role models for black students. A second blocked a similar program to shield recently hired black police officers from layoffs. A third blocked a city from opening opportunities for minority-owned construction companies by striking down its program to channel 30 percent of public works funds to them.

**Voting rights.** Making it harder for black and Hispanic candidates to overcome white racial-bloc voting, the judge has repeatedly struck down majority-black and majority-Hispanic voting districts because of their supposedly irregular shape. But the judge saw no problem with the gerrymandering of bizarrely shaped districts by Pennsylvania's Republican-controlled Legislature to rig elections against Democrats!

**Civil rights and women's rights.** Decision after decision has made it harder for victims of racial and gender discrimination to vindicate their rights. One used a narrow reading of Title IX, the federal law banning gender discrimination by federally funded schools and colleges, to block victims from suing unless the federal money went to the particular discriminatory program. A second blocked victims of racial and other discrimination from suing federally funded programs and institutions unless they can prove intent to discriminate -- often an impossible burden. A third barred victims of rape and domestic violence from suing under the federal Violence Against Women Act.

**Gay rights.** One decision allowed states to prosecute and brand gay people as criminals for enjoying sexual relations, even in the privacy of their own bedrooms. Another supported a homophobic group's discriminatory exclusion of gay boys and men, citing the group's "freedom of association."

**Religion.** The judge has often breached the wall of separation between church and state. Decisions boosting governmental subsidies for Catholic and other religious schools include one that supported "voucher" programs condemned by teachers groups and another that approved a state tax deduction for tuition paid to religious schools. Other decisions have forced public schools to open their doors to evangelical Bible clubs; forced a state university to subsidize a Christian student magazine; allowed a state legislature to pay a chaplain to open each day's session with a prayer; and supported official displays of explicitly Christian symbols, including a tax-funded Christian nativity scene as part of a city's holiday display.

**States' rights -- and guns.** One decision crippled enforcement of the Brady gun control law by striking down its requirement that local law enforcement officials perform background checks on handgun purchasers. A second struck down a federal law that sought to protect children by barring possession of guns in or near schools. A third immunized states from suits under the federal Fair Labor Standards Act, leaving 4.7 million state employees with no remedy.

**Death penalty.** The judge has been relentless in pushing death-row inmates toward execution chambers -- even in the face of eye-catching evidence of possible innocence and systematic racial discrimination. One decision expedited the execution of a coal miner -- whose guilt is doubted by experts -- because his lawyer had missed a state court filing deadline *by one day*. Two dissents supported executions of 16-year-olds and of defendants so insane that they have no idea what they did.

**Civil liberties.** One decision gave a virtual blank check for government investigators to conduct aerial surveillance of citizens -- even by hovering over the fenced yards of private homes. A second upheld the forfeiture of a woman's car because *her faithless husband* had been parked in it while receiving oral sex from a prostitute. Two more gave presidents absolute immunity and attorneys general almost absolute immunity from lawsuits for their official acts, including the Nixon administration's illegal wiretapping of political opponents. And the judge approved a police officer's fatal shooting of an unarmed, 15-year-old black youth, in the back, because he was suspected of fleeing the scene of a minor burglary.

**Choice.** The judge has called abortion "morally repugnant"; declared *Roe v. Wade* to be "on a collision course with itself"; claimed that governments have "compelling interests in the protection of potential human life ... throughout pregnancy"; and forced terrified minors to notify often-abusive parents (or beg judges for permission) before they can obtain abortions.

**Environment.** Among other anti-environment decisions, the judge overturned a long-established Clean Water Act regulation that had protected ponds and many wetlands from dredging and filling by profiteering developers.

**Big business.** One decision supported Big Tobacco's position that it could not be regulated in any way by the federal Food and Drug Administration -- not even to prevent use of TV ads to hook children and teenagers on cigarettes. A second overturned a jury's \$145 million award of punitive damages against a big insurance company that had refused in bad faith to settle a valid car-crash claim and thereby exposed a policyholder to personal liability.

I could go on. But as you've probably figured out by now, I have been playing a little trick. None of the opinions, dissents, or votes described above (accurately if incompletely) were Judge Alito's. All were Justice O'Connor's.

That would be the same **Sandra Day O'Connor** who is hailed on the Web sites of Alito's most bitter opponents as "moderate" (Naral Pro-Choice America); as "a critical vote ... in numerous cases to protect

Americans' rights and liberties" (People for the American Way); and as "beholden to nothing and to no one except the law" (NOW).

My purpose has been to illustrate how easily the tactics used by liberal groups to tar Alito could be used to portray even the sainted, moderate O'Connor as a fanatical conservative who "has sought to dismantle reproductive choice, undermine civil-rights enforcement, weaken environmental protections, restrict individuals' ability to seek justice in the courts when their rights are trampled by corporations, and diminish constitutional protections for abusive government intrusion into Americans' privacy," to borrow from a recent People for the American Way depiction of Alito.

I have, to be sure, taken certain liberties by using loaded language and by selectively omitting factual context and the many O'Connor decisions and votes that could be used to portray her as quite liberal.

But I have done no more slanting than many liberal groups -- and some journalists -- have done in their misleading campaign to caricature Alito. And while I have failed (until now) to mention that O'Connor has drifted markedly toward the liberal side of the spectrum over the past two decades, Alito's critics have similarly ignored much evidence that his 15 years of steady, scholarly, precedent-respecting work as a judge tell us more about him than a handful of widely (and misleadingly) publicized memos that he wrote more than 20 years ago.

Not to mention the critics' efforts to drown out the virtually unanimous praise voiced by the many moderates and liberals (as well as conservatives) who know Alito well: colleagues (current and former), classmates, friends, and former law clerks. Sure, they say, Alito is a conservative. But he also believes deeply that judges should be constrained by established legal rules and hard facts -- and should not be looking to promote political agendas. This helps explain why the American Bar Association's Standing Committee on Federal Judiciary has unanimously rated Alito "well qualified" for the Supreme Court -- the highest possible rating.

After reading hundreds of news articles and interviewing dozens of people during the nearly 10 weeks since Alito's nomination, I have yet to come across a single suggestion (even anonymous) by anyone well acquainted with the man that he will bring a radical conservative agenda to the Court. If I have missed anyone out there, please let me know.

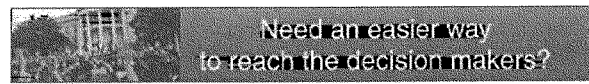
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