

Sam Alito: The Court's Most Consistent Conservative

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Only two weeks before Justice Samuel Alito marked his tenth anniversary on the Supreme Court, the Court struck down Florida's death penalty scheme. It held that the scheme violated the Sixth Amendment jury right because it permitted judges to sentence individuals to death based on facts not found by a jury.¹ Every Justice but one joined in that result. The lone Justice in dissent was Samuel Alito.² That case—and Justice Alito's willingness to stand alone in upholding a death penalty regime that the rest of the Court concluded was unconstitutional—highlights one fact that has become clear in Alito's first decade on the Court: there is no one to his right on the current Court. The current Supreme Court includes a number of conservative Justices. But even when compared with them, Justice Alito is the most consistently conservative. His votes are almost always in line with what one would predict based on the policy preferences of the party of the President that appointed him, i.e., Republican President George W. Bush. And that fact—more than his jurisprudence in particular areas, or his methodological approach to judging, or any other facet of his service on the Court—seems likely to define his legacy.

In this Essay, I discuss Justice Alito's consistent conservatism, in large part by contrasting him with the other conservatives on the current Court. The contrast with Chief Justice Roberts is particularly revealing. After all, Justice Alito joined the Court just four months after John Roberts joined it as Chief Justice,

1. *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016).

2. *Id.* at 624 (Alito, J., dissenting).

and one might have expected the two men to have very similar records as Justices. Both were nominated by the same Republican President; both had served in the Reagan Administration; and both had amassed conservative records as court of appeals judges (although Justice Alito had served much longer in that capacity). Yet while they have both been very conservative in their first decades on the Court, rapidly moving the law to the right in a number of different areas,³ Alito has been meaningfully more consistent in his conservatism, especially in recent years. Unlike the Chief Justice, who will occasionally vote in ways that are likely at odds with his ideological preferences, Justice Alito's voting record on the Court is almost always in line with his conservative ideological preferences, even in the face of adverse precedent. Indeed, in at least one area, Justice Alito has skillfully shaped the Court's agenda, inviting litigants to bring cases that would move the law in a manner consistent with his conservative philosophy.

I. ALITO'S CONSERVATIVE RECORD

Justice Alito is the most junior of the conservative Justices on the current Court. But in his first decade as a Justice, he has written several significant opinions that illustrate just how conservative his record is. Although these opinions cover a range of topics and have taken a number of forms (not only majority opinions, but also concurrences and dissents), I discuss only a small sample of them here. Notably, these cases do not reflect any overarching jurisprudential philosophy or approach. Indeed, Justice Alito has candidly acknowledged that he does not rigidly adhere to any specific methodology in every case. He has stated that in cases that originalism alone cannot resolve, he “use[s] [his] judgment to apply” its principles.⁴ What each case demonstrates, however, is Justice Alito's consistent commitment to conservative principles—even when that requires deviating from precedent to move the law in his desired direction.

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3. For a look at Chief Justice Roberts' voting record across a number of different issue areas, see *Roberts at 10*, CONST. ACCOUNTABILITY CTR. (2015), <http://theconstitution.org/think-tank/issue-brief/roberts-10> [<http://perma.cc/SB8C-VS9M>] (providing snapshots on areas, such as campaign finance and voting, access to the courts, and race, in which Chief Justice Roberts has consistently voted to move the law to the right, and making clear that Justice Alito has been with him every step of the way).
 4. Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 4:00 PM), http://spectator.org/58731_sam-alito-civil-man [<http://perma.cc/VMC3-TZHF>] (“I start out with originalism But when you have to apply that to things like a GPS that nobody could have dreamed of then, I think all you have is the principle and you have to use your judgment to apply it.”).

Justice Alito's opinion in *Ledbetter v. Goodyear Tire & Rubber Co.*⁵ is instructive. Written just two years into his tenure on the Court, Justice Alito wrote in a 5-4 opinion that a woman could not pursue a claim of pay discrimination against her employer because she did not bring it quickly enough.⁶ The opinion reflected Justice Alito's commitment to conservative values, and his willingness to depart from precedent to realize those principles. Indeed, Justice Ginsburg specifically noted in her dissent that Justice Alito's opinion was less "faithful to precedent," "in tune with the realities of the workplace," and "respectful of [the governing law's] remedial purpose" than the dissent's interpretation.⁷ As Justice Ginsburg explained, Supreme Court precedent supported the notion that not only the "pay-setting decision," but also "the actual payment of a discriminatory wage," constitutes an unlawful practice, and thus "each payment of a wage or salary infected by sex-based discrimination constitutes an unlawful employment practice."⁸ Justice Ginsburg also explained at length why such an approach makes sense, noting for example that "[c]ompensation disparities . . . are often hidden from sight," thus making it impossible for employees to sue as quickly as Justice Alito's opinion for the Court would require.⁹ Justice Alito's opinion failed to meaningfully engage with these realities of the workplace and thus would have significantly limited the ability of women to bring claims of pay discrimination had Congress not passed corrective legislation.¹⁰

Justice Alito's willingness to move the law to the right was again on display in another important case involving women's rights, *Burwell v. Hobby Lobby Stores*.¹¹ In that case, the Court held, again 5-4, that for-profit companies need not comply with the Affordable Care Act's (ACA) contraceptive coverage mandate if the companies' owners objected to the use of contraceptives for religious reasons.¹² According to Justice Alito, "[t]he plain terms of [the Religious Free-

5. 550 U.S. 618 (2007).

6. *Id.* at 621.

7. *Id.* (Ginsburg, J., dissenting).

8. *Id.* at 646-48 (discussing *Bazemore v. Friday*, 478 U.S. 385 (1986), and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)). Justice Ginsburg also explained that Court precedent had distinguished between two types of unlawful employment actions: "discrete acts" and "acts that recur and are cumulative in impact." *Id.* at 647. "Pay disparities, of the kind *Ledbetter* experienced," she went on to explain, "have a closer kinship to [the latter] than to [the former]." *Id.* at 648. Therefore, "the cases on which the [majority] relies hold no sway." *Id.* at 651.

9. *Id.* at 649.

10. Lilly *Ledbetter* Fair Play Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

11. 134 S. Ct. 2751 (2014).

12. *Id.* at 2759.

dom Restoration Act (RFRA)] make it perfectly clear that Congress did not discriminate . . . against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs,” and compliance with the ACA contraceptive mandate would substantially burden their religious beliefs.¹³ In reaching this result, the Court extended free exercise rights to for-profit corporations and concluded that those rights take priority over the rights of employees to contraceptive coverage guaranteed by federal law. Those conclusions are striking in and of themselves, but just as striking is the move Justice Alito made to reach them: he departed subtly, but sharply, from precedent. Even though RFRA was explicitly enacted to “restore the compelling interest test as set forth in” certain Supreme Court cases,¹⁴ Justice Alito’s opinion for the Court suggested that those earlier cases were no longer relevant.¹⁵

Again in dissent, Justice Ginsburg rejected the Court’s understanding of RFRA, explaining that “its purpose is specific and written into the statute itself”: to restore the Court’s Free Exercise doctrine as it existed prior to the Court’s 1990 decision in *Employment Division v. Smith*, not to accord free exercise rights to for-profit corporations¹⁶ or to allow such corporations to avoid compliance with the law when the burden on their religious belief is not substantial.¹⁷ She also touched on the practical consequences of the Court’s decision, noting that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their

13. *Id.* (“If these consequences do not amount to a substantial burden, it is hard to see what would.”).

14. *Id.* at 2791 (Ginsburg, J., dissenting) (quoting RFRA, 42 U.S.C. § 2000bb(b)(1) (2012)).

15. *Id.* at 2791-92 (“Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, [those earlier cases.]”); see also Micah Schwartzman et al., *The New Law of Religion*, SLATE (July 3, 2014 11:54 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/07/after_hobby_lobby_there_is_only_rfra_and_that_s_all_you_need.html [<http://perma.cc/T5TE-YJSX>] (“Quietly, buried in the text and footnotes of the majority opinion, Justice Alito holds that RFRA is a complete break from earlier law, a discontinuity—not a ‘restoration,’ but a revolution—in the test for protecting religious liberty Not only does the court in *Hobby Lobby* ignore the legal principles behind RFRA, but it departs even more dramatically from the case law Congress actually meant to restore.”).

16. *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) (“[T]he exercise of religion is characteristic of natural persons, not artificial legal entities.”).

17. *Id.* at 2799 (“[T]oday’s decision elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger. Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.”).

reproductive lives,”¹⁸ and explaining that the Court’s decision would undermine Congress’s effort in the ACA to provide for “coverage of preventive care responsive to women’s needs.”¹⁹ Moreover, as scholars have noted, the broader consequences of *Hobby Lobby* may also be significant, as it may “open the floodgates to a lot of new claims for religious exemptions down the road, on matters ranging from antidiscrimination law to other medical procedures such as blood transfusions or vaccinations.”²⁰

Perhaps most significantly, Justice Alito has at times proven adept at setting the Court’s agenda even as a relatively junior Justice. He wrote two opinions actively encouraging conservative activists to challenge *Abood v. Detroit Board of Education*,²¹ a nearly forty-year-old Supreme Court precedent that allows public sector unions to collect a portion of collective bargaining costs from all government employees who benefit from that bargaining, including those who do not belong to the union.

First, in *Knox v. Service Employees International Union, Local 1000*,²² the Court held that public-sector unions cannot impose a special assessment without the affirmative consent of a member upon whom it is imposed. Despite the existence of *Abood*, Justice Alito wrote for the Court that “[a]cceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly—one that we have found to be justified by the interest in furthering ‘labor peace.’ But it is an anomaly nevertheless.”²³ Two years later, in *Harris v. Quinn*,²⁴ Justice Alito took even greater aim at *Abood* in a case in which the Court held, 5-4, that *Abood* did not extend to the home health care workers involved in that case. Indeed, his criticism of that well-established precedent was so striking and explicit that Justice Kagan, in dissent, wrote that “[r]eaders of today’s decision will know that *Abood* does not rank on the majority’s top-ten list of favorite precedents—and that the majority could not restrain itself from saying (and saying and saying) so.”²⁵

In short, Justice Alito, perhaps recognizing that he did not yet have the votes to overrule *Abood* outright, was willing to bide his time, writing opinions

18. *Id.* at 2787-88 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992)).

19. *Id.* at 2788.

20. DAVID H. GANS & ILYA SHAPIRO, RELIGIOUS LIBERTIES FOR CORPORATIONS? HOBBY LOBBY, THE AFFORDABLE CARE ACT, AND THE CONSTITUTION 64 (2014).

21. 431 U.S. 209 (1977).

22. 132 S. Ct. 2277 (2012).

23. *Id.* at 2290 (internal citation omitted).

24. 134 S. Ct. 2618 (2014).

25. *Id.* at 2652-53 (Kagan, J., dissenting).

that incrementally chipped away at the precedent while making the case to overrule it altogether—and showing that four of his colleagues agreed with his criticisms. Conservative activists took Justice Alito up on his clear invitation to challenge *Abood*, bringing a frontal challenge to that case before the Court in *Friedrichs v. California Teachers Association*. In the wake of Justice Scalia's passing in 2016, the Court ultimately split 4-4 in *Friedrichs*, thereby affirming the lower court judgment applying *Abood*.²⁶ But the fact that *Abood* remains good law is not for Justice Alito's lack of effort.

In his first decade on the high court, Justice Alito has also written scathing dissents that reflect his firm conservative ideological convictions. For example, in *Fisher v. University of Texas at Austin*, Justice Alito dissented from Justice Kennedy's opinion upholding the University of Texas's race-conscious admissions program.²⁷ Starting his dissent with the pointed observation that “[s]omething strange has happened since our prior decision in this case,”²⁸ Alito went on to discuss at great length why he believed the University's plan could not satisfy strict scrutiny. According to Alito, the University “failed to define [its interest in the educational benefits of diversity] with any clarity or to demonstrate that its program is narrowly tailored to achieve that or any other particular interest.”²⁹ As in *Ledbetter*, Justice Alito was largely unmoved by claims that his legal philosophy did not align with real-world considerations—here, a demonstrated need for the program and the benefits it offered the University's students. As Justice Kennedy wrote for the Court, the “contention that the University's goal was insufficiently concrete is rebutted by the record,” and the “record itself contains significant evidence, both statistical and anecdotal, in support of the University's position” that it needed to consider race.³⁰

Likewise, in *Whole Woman's Health v. Hellerstedt*, which was issued just four days after *Fisher*, Justice Alito wrote a lengthy dissent from Justice Breyer's opinion striking down two provisions of a restrictive Texas abortion law.³¹ Justice Alito again drew radically different empirical conclusions than did the majority about the provisions' effect on women's access to abortion in Texas. According to Justice Alito, “Petitioners failed to provide any evidence of the actual capacity of the facilities that would be available to perform abortions in compli-

26. 136 S. Ct. 1083 (2016), *reh'g denied*, 2016 WL 3496857.

27. 136 S. Ct. 2198 (2016).

28. *Id.* at 2215 (Alito, J., dissenting).

29. *Id.* at 2220.

30. *Id.* at 2211-12 (Kennedy, J.).

31. 136 S. Ct. 2292 (2016).

ance with the new law.”³² In fact, Justice Breyer’s opinion for the Court relied substantially on evidence in the record that demonstrated that the requirements “place[] a ‘substantial obstacle in the path of a woman’s choice,’”³³ in addition to evidence that they would not benefit women’s health.³⁴

Finally, as noted at the outset, Justice Alito dissented in *Hurst v. Florida*,³⁵ the case in which the Court held that Florida’s death penalty sentencing scheme violated the Sixth Amendment’s guarantee of a jury trial because it allowed a judge to override a jury’s sentencing recommendation. As Justice Sotomayor wrote for the Court, “The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury’s mere recommendation is not enough.”³⁶ Every other Justice on the Court—including every other conservative Justice on the Court—joined Justice Sotomayor’s opinion, except Justice Alito. According to Justice Alito, it was sufficient that the jury “plays a critically important role.”³⁷ In addition, Justice Alito also made clear that “even if there was a constitutional violation in this case,” he would have affirmed the death sentence anyway on the ground that “the error was harmless beyond a reasonable doubt.”³⁸ Thus, Justice Alito has shown that he is occasionally willing to go it alone, staking out positions to the right of every other Justice on the Court.³⁹

32. *Id.* at 2343 (Alito, J., dissenting). Justice Alito also held that the plaintiffs’ claims were barred on res judicata grounds. *Id.* at 2331-42.

33. *Id.* at 2312 (Breyer, J.) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)); see also *id.* at 2316.

34. *Id.* at 2311, 2316.

35. 136 S. Ct. 616 (2016)

36. *Id.* at 619.

37. *Id.* at 626 (Alito, J., dissenting).

38. *Id.*

39. Justice Alito has been the lone dissenter on at least five other occasions—twice in First Amendment cases in which he disagreed with the rest of the Court that the speech at issue merited First Amendment protection, *Snyder v. Phelps*, 562 U.S. 443 (2011); *United States v. Stevens*, 559 U.S. 460 (2010); see also Robert Barnes, *Alito Stands Alone on Supreme Court’s First Amendment Cases*, WASH. POST (Mar. 3, 2011, 7:36 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/03/AR2011030302920.html> [http://perma.cc/4UR8-99KE]; and three times in criminal cases, *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Evans v. Michigan*, 133 S. Ct. 1069 (2013); see also Alberto R. Gonzales, *In Search of Justice: An Examination of the Appointments of John G. Roberts and Samuel A. Alito to the U.S. Supreme Court and Their Impact on American Jurisprudence*, 22 WM. & MARY BILL RTS. J. 647, 696 (2014) (noting “Justice Alito’s passion for criminal justice” and pointing out that his “overall theory of criminal justice . . . is both supportive of law enforcement and unyielding in regard to punishment once a defendant is properly found guilty of a crime”).

Of course, these are just a few opinions that Justice Alito has written in his first decade on the Court, yet they are illustrative of his broader record. In the next Section, I consider how Alito's broader record compares with that of the other conservatives on the Court, particularly the Chief Justice.

II. COMPARING ALITO TO SOME OF THE COURT'S OTHER CONSERVATIVE JUSTICES

In the first decade of the Roberts Court, there were a number of very conservative Justices on the Supreme Court. Yet in that first decade, Alito has proven himself to be the most consistently conservative.

The contrast with the Chief Justice is particularly striking. As noted earlier, one might have expected the Chief Justice and Justice Alito to have similar records on the Court in light of their similar backgrounds. After all, both had similar elite academic credentials; both had served in the Reagan Administration; both had amassed conservative records as court of appeals judges; and both were appointed by President George W. Bush while they were in their fifties. Early on, that prediction would have been borne out. According to SCOTUSblog, “[i]n OT06, the Chief Justice and Justice Alito found themselves in agreement more than any other pair of Justices. The two Bush appointees agreed in full in 88% of the cases they both heard, essentially equal to their 89% rate the previous Term.”⁴⁰ But in recent years, that has become markedly less true, as Justices Alito and Roberts have been on opposite sides of a number of significant cases.

The two most high profile examples of this divergence are surely the two challenges to the Affordable Care Act, *NFIB v. Sebelius*⁴¹ and *King v. Burwell*.⁴² In the former, the Court, in a 5-4 decision, upheld the individual mandate of the Affordable Care Act against constitutional challenge.⁴³ In the latter, the Court, this time in a 6-3 decision, held that the tax credits that were essential to the effective operation of the law should be available nationwide.⁴⁴ In both cases, Justice Alito was in the minority. Justices Roberts and Alito were also on

40. *End-of-Term “Super StatPack” – OT06*, SCOTUSBLOG 3 (June 28, 2007), <http://www.scotusblog.com/archives/SuperStatPack.pdf> [<http://perma.cc/W44M-LKKX>].

41. 132 S. Ct. 2566 (2012).

42. 135 S. Ct. 2480 (2015).

43. 132 S. Ct. at 2593-94. The Court, 7-2, also struck down the law's Medicaid expansion on the ground that such federal action, which the Court viewed as “coercing the States to adopt changes [the federal government] wants” by threatening to withhold funds, was not authorized under the Spending Clause. *Id.* at 2601-07.

44. 135 S. Ct. at 2496.

opposite sides of the Court's 6-3 divide in *Arizona v. United States*, in which the Court struck down key parts of Arizona's anti-immigrant law.⁴⁵ By my count, there have been at least fifteen cases, some of them quite significant, in which Justices Roberts and Alito were on opposite sides of an issue.⁴⁶

Why the divergence? As I have written elsewhere, I believe Chief Justice Roberts, while very conservative, also cares deeply about the institutional legitimacy of the Court and his reputation as its Chief Justice.⁴⁷ Since early in his tenure on the Court, he has publicly worried about the damage to the Court that will result if the Court is seen as a political body and the Justices as politicians in robes. These institutional concerns may help explain why, at least occasionally, the Chief Justice will put law over ideology, as he did in the two Affordable Care Act cases, for example.

Indeed, the Chief Justice may have been concerned about how it would look for the Court to decide those cases involving President Obama's landmark achievement by a 5-4 partisan vote, especially given the weakness of the arguments offered by the law's challengers. Even in lower profile cases, the fact that the Chief Justice sometimes votes in ways that are at odds with what one might expect his ideological preferences to be sends a message in which the Chief Justice very much believes: judges are not simply politicians in robes. When it comes to Justice Alito, however, he has never expressed the strong institutional concerns that Justice Roberts has, and perhaps as a consequence, his record is almost always consistent with his conservative ideology. While he will occasionally vote in ways that are at odds with his likely ideological preferences,⁴⁸ such votes are quite rare.

45. 132 S. Ct. 2492 (2012).

46. *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Hurst v. Florida*, 136 S. Ct. 616 (2016); *King v. Burwell*, 135 S. Ct. 2480 (2015); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015); *Rodriguez v. United States*, 135 S. Ct. 1609 (2015); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014); *Bond v. United States*, 134 S. Ct. 2077 (2014); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

47. Brianne Gorod, *Roberts at 10: A Very Conservative Chief Justice Who Occasionally Surprises*, 2015 CONST. ACCOUNTABILITY CTR. 1, 8, http://theconstitution.org/sites/default/files/briefs/Roberts_at_10-Capstone.pdf [<http://perma.cc/24WB-U3PY>].

48. For example, Justice Alito voted with the rest of the Court to hold that warrantless cell phone searches incident to arrest are generally unconstitutional. *See Riley v. California*, 134 S. Ct. 2473 (2014). That said, even in that case, Alito stood alone, writing separately to explain that he "would reconsider the question presented . . . if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of in-

The contrast with Justices Antonin Scalia and Clarence Thomas is also illuminating.⁴⁹ Although their records during this period were very conservative, there were areas in which their votes did not track their likely ideological preferences. In some areas of criminal procedure, for example, Justice Scalia and Justice Thomas have consistently voted against their ideological interest in law enforcement, and in favor of criminal defendants. In the Sixth Amendment context, for example, Justices Scalia and Thomas voted, along with three of the Court's more liberal members, to hold that the admission of "affidavits reporting the results of forensic analysis" without the testimony of the individuals who performed the analysis violated the Sixth Amendment right to confrontation.⁵⁰

Moreover, in the Fourth Amendment context, particularly in the last few years of his life, Justice Scalia became a champion of a robust interpretation of the Fourth Amendment, repeatedly voting for interpretations that would favor those who were searched over the government.⁵¹ Indeed, Justice Scalia publicly acknowledged that these votes were at odds with his own ideological preferences, stating (in a discussion of the Sixth Amendment):

I'm a law-and-order type, . . . but I ought to be the pin-up for the criminal defense bar, because my originalist philosophy leads me to defend

formation or perhaps other variables." *Id.* at 2497 (Alito, J., concurring). As I have written elsewhere, Alito's preferred approach is "fundamentally wrong." Brianne J. Gorod, *Why the Constitution Trumps Any State's Ban on Same-Sex Marriage*, NEW REPUBLIC (Apr. 23, 2015), <http://newrepublic.com/article/121623/constitution-not-voters-should-have-final-say-gay-marriage> [http://perma.cc/K3Y2-KPRY].

49. Although beyond the scope of this Essay, it bears mention that the differences between Justice Alito, on the one hand, and Justices Scalia and Thomas, on the other, extend beyond the jurisprudential. For example, even though Justice Alito is certainly willing to write alone when he feels strongly about the issue, *see supra* note 39, he is also at times willing to proceed incrementally, especially when doing so means he can write a majority opinion that moves the law in his desired direction, *see supra* notes 21-26 & accompanying text. Justice Thomas, by contrast, has been less likely to author significant majority opinions during his time on the Court because his idiosyncratic views in a number of issue areas leave him unable to garner a majority of votes for his position.
50. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307 (2009); *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."). Interestingly, Confrontation Clause cases are ones in which the Court's normal ideological divide often breaks down. In *Michigan v. Bryant*, for example, Justice Sotomayor wrote an opinion for the Court holding that a statement that a wounded crime victim made to police was nontestimonial and thus could be admitted without violating the Confrontation Clause, even though the victim subsequently died and could not testify. 131 S. Ct. 1143 (2011). Of the eight Justices who participated in the case (Justice Kagan was recused), Justices Scalia and Ginsburg were the only ones to dissent.
51. *See, e.g., Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

rigorously the right to jury trial, to defend the original meaning of the confrontation clause—all of which benefits criminal defendants, who I would rather see put away. But once you show me the original thinking, I am handcuffed. I cannot do the nasty conservative things I would like to do to the country.⁵²

Again, while Justice Alito will occasionally vote in ways that are at odds with his likely ideological preferences, such votes are far and few between. Indeed, they are far rarer for Justice Alito than they are for any of the other conservatives Justices with whom he has served, making him the most consistently conservative Justice on the current Court.

CONCLUSION

Over ten years ago when Judge Alito was nominated to the Supreme Court, one Court watcher noted that “[n]o one on the conservative base can be unhappy with Sam Alito.”⁵³ Ten years into his tenure on the Court, Justice Alito has more than vindicated that prediction. He may not be as vocal as was Justice Scalia; he may not be as ready to overturn long-settled precedent as is Justice Thomas; but his votes are the most consistently conservative. Whether that fact will be the one that defines his overall legacy remains to be seen, but it will, at minimum, be a vital part of his story.

Brianne J. Gorod is Chief Counsel at the Constitutional Accountability Center. She would like to thank Kelly Landis for her helpful comments and suggestions and the editors of the Yale Law Journal Forum for their excellent editorial assistance. The views expressed are solely her own.

52. Jerry de Jaeger, *Justice Scalia Comes Home to the Law School*, RECORD (Spring 2012), <http://www.law.uchicago.edu/alumni/magazine/spring12/scalia> [http://perma.cc/5WYQ-KM6J]. Indeed, although there were certainly areas in which Justice Scalia's commitment to originalism did not constrain him as much as he claimed that it did, there were even some areas outside the criminal context in which his commitment to originalism led him to surprising places. See, e.g., *BMW of N. Am. v. Gore*, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting) (rejecting the argument that the Due Process Clause imposes substantive limits on the amount of punitive damage awards).

53. *Today Show* (NBC television broadcast Oct. 31, 2005) (interview with Jonathan Turley), quoted in Tom Donnelly & Brianne Gorod, *None to the Right of Samuel Alito*, THE ATLANTIC (Jan. 30, 2016), <http://www.theatlantic.com/politics/archive/2016/01/none-to-the-right-of-samuel-alito/431946/> [http://perma.cc/445M-HNV9].

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