Supplementary Material

Chapter 11: The Contemporary Era—Foundations/Principles

The Nomination of Samuel Alito to the U.S. Supreme Court (2006) [1]

Judge Samuel Alito was a respected but low-key conservative who made a career as a prosecutor and judge. He had served in the Reagan administration and been appointed to the Court of Appeals for the Third Circuit by President George W. Bush. In 2005, he was nominated to fill the vacancy of the retiring Justice Sandra Day O'Connor. His confirmation hearings were scheduled to follow those of John Roberts, who had been nominated to replace the deceased Chief Justice William Rehnquist.

O'Connor's departure had particular significance because she had cast a critical vote to uphold abortion rights in the 1992 Casey v. Planned Parenthood *decision. The plurality opinion in that case emphasized the importance of stare decisis, or following precedent. Alito's confirmation hearings became an opportunity for the senators and the nominee to articulate their varying views on the importance of following established precedent in future cases and the conditions under which precedent should be followed or be set aside. Recent confirmation hearings have also become an opportunity for senators to attempt to influence Supreme Court nominees, as well as showcase their views for their political supporters and constituents in a very public setting. The members of the Senate Judiciary Committee tend to be drawn from the ideological extremes, since they have the most interest in the issues that come before the committee. Committee Chairman Arlen Specter was an exception in being a relative moderate from a swing state. At the time of the Alito nomination, Specter was a Republican; he later switched parties after Obama's presidential victory in 2008. By contrast, Republican Sam Brownback was preparing to run a presidential campaign as a social conservative, and Democrat Charles Schumer was organizing the national Democratic campaign for the 2006 midterm Senate elections.*

Consider the following questions when reading the excerpt below. What different understandings of precedent did the various senators offer? Which do you find most attractive? To what extent were these understandings of precedent driven by differing commitments to judicial protection of abortion rights? Suppose the senators were more concerned with judicial decisions on the right to bear arms. Would the discussion of precedent be the same?

SENATOR ARLEN SPECTER (Republican, Pennsylvania): Let me move directly into *Casey v. Planned Parenthood* (1992). . . . How would you weigh that consideration [stare decisis] on the woman's right to choose?

JUDGE SAMUEL ALITO: Well, I think the doctrine of stare decisis is a very important doctrine. It's a fundamental part of our legal system.

And it's the principle that courts in general should follow their past precedents**.** And it's important for a variety of reasons. It's important because it limits the power of the judiciary. It's important because it protects reliance interests. And it's important because it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.

It's not an exorable command, but it is a general presumption that courts are going to follow prior precedents. . . .

[1] Excerpt from United States Senate Judiciary Committee, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States*, 109th Cong., 2nd Sess. (2006).

SPECTER: Let me move on to another important quotation out of *Casey*.

Quote: "A terrible price would be paid for overruling *Casey*—or overruling *Roe*. It would seriously weaken the court's capacity to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law. And to overrule *Roe v. Wade* (1973) under fire would subvert the court's legitimacy."

Do you see the legitimacy of the court being involved in the precedent of *Casey*?

ALITO: Well, I think that the court and all the courts—the Supreme Court, my court, all of the federal courts—should be insulated from public opinion. They should do what the law requires in all instances.

That's why the members of the judiciary are not elected. We have a basically democratic form of government, but the judiciary is not elected. And that's the reason: so that they don't do anything under fire. They do what the law requires. . . .

SPECTER: Judge Alito, let me move to the dissenting opinion by Justice Harlan in *Poe v. Ullman* (1961) where he discusses the constitutional concept of liberty and says, quote, "The traditions from which liberty developed, that tradition is a living thing."

Would you agree with Justice Harlan that the Constitution embodies the concept of a living thing?

ALITO: I think the Constitution is a living thing in the sense that matters . . .—it sets up a framework of government and a protection of fundamental rights that we have lived under very successfully for 200 years. And the genius of it is that it is not terribly specific on certain things. It sets out—some things are very specific, but it sets out some general principles and then leaves it for each generation to apply those to the particular factual situations that come up.

. . .

SPECTER: Judge Alito, the commentators have characterized *Casey* as a super-precedent.

. . .

Do you agree that *Casey* is a super-precedent . . . ?

ALITO: Well, I personally would not get into categorizing precedents as super-precedents or super-duper precedents or any. . .

SPECTER: Did you say super-duper?

ALITO: Right.

(LAUGHTER)

SPECTER: Good. I like that.

ALITO: Any sort of categorization like that sort of reminds me of the size of the laundry detergent in the supermarket.

I agree with the underlying thought that when a precedent is reaffirmed . . . each time it's reaffirmed that is a factor that should be taken into account in making the judgment about stare decisis. And when a precedent is reaffirmed on the ground that stare decisis precludes or counsels against reexamination of the merits of the precedent, then I agree that that is a precedent on precedent.

. . .

SENATOR CHARLES SCHUMER (Democrat, New York): Now you've tried to reassure us that stare decisis means a great deal to you. You point out that prior Supreme Court precedents, like *Roe*, will stand because of the principle.

. . .

I just want to ask you this. Stare decisis is not an immutable principle, right?

ALITO: It is a strong principle. And in general courts follow precedents. The Supreme Court needs a special justification for overruling a prior case.

SCHUMER: But they have found them. . . .

In recent years the court has overruled various cases in a rather short amount of time. You mentioned I think it was *National League of Cities* (1976) about fair labor standards, and it was overruled just nine years later by *Garcia* (1985). . . . *Bowers v. Hardwick* (1986) was overruled by *Lawrence v. Texas* (2003). And of course . . . *Plessy* (1896) was overruled by *Brown* (1954). . . .

So the only point I'm making is that despite stare decisis, it doesn't mean a Supreme Court justice who strongly believes in stare decisis won't ever overrule a case. Is that correct? You can give me a yes or no.

ALITO: Yes.

. . .

SCHUMER: OK. . . . And remember what [Justice Thomas] said when he was sitting in the same chair you're sitting in. He pledged fealty to stare decisis.

Justice Scalia said Justice Thomas, "doesn't believe in stare decisis, period. If a constitutional line of authority is wrong, he would say, 'Let's get it right.'"

Then Justice Scalia said, "I wouldn't"—speaking of himself—"I wouldn't do that."

. . .

And I'm not saying Justice Thomas was disingenuous with the committee when he was here. I'm just saying that stare decisis is something of an elastic concept that different judges apply in different ways.

. . .

SENATOR SAM BROWNBACK (Republican, Kansas): Judge Alito, the Supreme Court has gotten a number of things wrong at times, too. That would be correct. And the answer when the court gets things wrong is to overturn the case. . . . [T]hat's the way it works, isn't that correct?

ALITO: Well, when the court gets something wrong and there's a prior precedent, then you have to analyze the doctrine of stare decisis. It is an important doctrine, and I've said a lot about it—

BROWNBACK: Wait. Let me just ask you. Was *Plessy* wrong, *Plessy v. Ferguson*?

ALITO: *Plessy* was certainly wrong.

BROWNBACK: OK, I mean, and you've gone through this. *Brown v. Board of Education*, which is in my hometown of Topeka, Kansas. . . . Fifty years ago, that overturned *Plessy*. *Plessy* had stood on the books since 1896. I don't know if you knew the number. And I've got a chart up here. It was depended upon by a number of people for a long period of time. You've got it sitting on the books for 60 years, twice the length of time of *Roe v. Wade*. You've got these number of cases that considered *Plessy* and uphold *Plessy* to the dependency. And yet *Brown* comes along . . . And the court looks at this and they say unanimously, that's just not right.

Now, stare decisis would say in the *Brown* case you should uphold *Plessy*. Is that correct?

ALITO: . . . [C]ertainly it would be a factor that you would consider in determining whether to overrule it. It's a doctrine that you would consider.

BROWNBACK: But obviously—obviously, *Brown* overturned it. And thank goodness it did, correct?

ALITO: Certainly.

BROWNBACK: That it overturned all these super-duper precedents that had been depended upon in this case because the court got it wrong in *Plessy*. Is that correct?

ALITO: The court certainly got it wrong in *Plessy*, and it got it spectacularly wrong in *Plessy*, and it took a long time for that erroneous decision to be overruled.

. . .

BROWNBACK: I want to give you another number. And that is that in over 200 other cases, the court has revisited and revised earlier judgments. In other words, in some portion or in all the cases, the court got it wrong in some 200 cases. And thank goodness the court's willing to review various cases.

. . .

Settled law? Super-duper precedents? I think there's places where the court gets it wrong, and hopefully they will continue to be willing to revisit it.

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