REHNQUIST TO ROBERTS: THE "REAGAN REVOLUTION" FULFILLED?

LYLE DENNISTON[†]

In response to Linda Greenhouse, *How Not To Be Chief Justice: The Apprenticeship of William H. Rehnquist*, 154 U. PA. L. REV. 1365 (2006).

Exactly one week before Chief Justice Warren E. Burger's retirement was publicly announced (the White House knew in advance of his plan), the Supreme Court gave President Reagan and his aides a reminder of what could be at stake in the selection of his successor. More than anything else in its domestic aspirations, the Reagan Administration wanted a more conservative Court, especially to raise the chances for overruling *Roe v. Wade*[1]—that despised legacy of the Burger Court. On June 11, 1986, the Court reaffirmed the right to seek an abortion, but this time it was only by the narrowest of margins—5 to 4.[2] That had never happened before. As important as the vote itself was the fact that four Justices, the dissenters, made it clear they were ready to reconsider *Roe*; thus, a single vote seemed to hold *Roe* in place.

The Reagan Administration, of course, had other ambitions for a more conservative Court. It was eager for a revival of the prerogatives of the states—its "New Federalism" campaign. It wanted to close the widening separatism on church-state matters. It was troubled by the Burger Court's failure to do much in rolling back the Warren Court's constitutional protections for criminal suspects.

In the mind of President Reagan's advisers, Associate Justice William H. Rehnquist was just the nominee who would advance the Administration's agenda on abortion, federalism, religion, and crime.

Indeed, Rehnquist had been a dissenter in *Roe v. Wade*, and in 1986, he remained a staunch opponent. He was one of the dissenters in the *Thornburgh* case that year. Another was Justice Sandra Day O'Connor. But, as matters turned out, it was Rehnquist, not O'Connor, who emerged from White House scrutiny in the selection

---

[†] Reporter, SCOTUSblog.com.

[1] 410 U.S. 113 (1973).

[2] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *overruled in part by* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

of a new Chief Justice. In fact, word leaked out of the White House, after the June 18 announcement of Rehnquist's appointment, that O'Connor had been passed over. One news account based on those leaks said:

> The apparent reason for [O'Connor's] failure . . . is a strong indication of the aides' determination to get someone to head the Supreme Court who could be depended upon to stay loyal to the President's notion of judicial conservatism. Justice O'Connor, sources here said, was dropped because she could not compete with Justice Rehnquist on the dependability index that those weighing the choice used. . . . Her recent voting patterns seem to have suggested to some key officials that she may not turn out to be as conservative in her views, or at least not as predictably conservative, as he is.[3]

And, of course, those White House lieutenants turned out to be quite right.

Because of O'Connor, in significant part, the campaign to cast *Roe* aside had not succeeded, despite repeated tries by Reagan Administration lawyers appearing in the Supreme Court.[4] And it was anything but clear that there actually had been a "Reagan Revolution" on the Court, at least not one genuinely deserving of the word "revolution"—again, mostly because the moderate centrism of O'Connor remained a constraint. That goal remained as elusive—and yet as eagerly desired—when Rehnquist died in office on September 3, 2005, as on the day he was elevated to the Chief Justiceship.

True, Rehnquist had succeeded—with significant aid from O'Connor—in the restoration of the concept of "state sovereignty" and a revival of federalism jurisprudence. That, indeed, was Rehnquist's most significant personal contribution to American jurisprudence.[5] But Rehnquist was not able to mass a Court for anything more than an incremental advance of conservative church-state decisions, and it was he who wrote the decision in *Dickerson v. U.S.*,[6] putting the *Miranda v. Arizona*[7] decision on a firm constitutional foundation for the first time, and for no less than a 7-2 majority—exactly the

---

[3] Lyle Denniston & Robert Timberg, *Reliability as Conservative Won Post for Rehnquist*, BALT. SUN, June 19, 1986.

[4] *See* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1991). The core holding of *Roe v. Wade* was salvaged in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[5] He began this project in earnest in his third year on the Court, in a dissenting opinion in the otherwise rather obscure case of *Fry v. United States*, 421 U.S. 542 (1975).

[6] 530 U.S. 428 (2000).

[7] 384 U.S. 436 (1966).

result against which Reagan's Attorney General, Edwin Meese, had so passionately warred.

Rehnquist was also unable to stop the opening and expansion of a new gay rights jurisprudence, a development that the nation's Christian conservatives (and many Republican officeholders) saw as tearing at the very social fabric of the nation. And he had cast his vote to support the Court's ruling, perhaps the most important in history on women's equality, in the Virginia Military Institute case.[8]

If the Chief Justice had been stymied in a bid to revolutionize the Court, so had Justice Antonin Scalia—named by President Reagan to take Rehnquist's seat. Widely regarded as brilliant and ambitious, Scalia was expected, alongside Rehnquist, to lead the Court inexorably to the right; he would be its philosopher king. But that "conservative moment" came and went.[9]

But then there came Justice O'Connor's retirement on July 1, 2005, and a sea change in the Court's modern history seemed ready to begin, especially with President George W. Bush, a deep-dyed conservative, in the White House. A much more politically confident Christian Right was now determined to make over the Supreme Court in its own image.

The "sons of the Reagan Revolution," a cadre of smart, young legal professionals, who had populated the Justice Department under Edwin Meese in the Reagan years (providing it with some of the brashest ideas for changing the law), were now grown-up, accomplished lawyers and judges who—by all appearances—were still true believers in the cause. Their names showed up on every short list for Supreme Court nominations in the Bush II Administration. It was from that list that the President, first and last, was determined to pluck John Glover Roberts, Jr., a freshman federal Circuit Court judge who had been one of the most seasoned and respected advocates at the Supreme Court Bar after his stint lawyering in the Reagan Administration. There was no hesitancy in the White House in putting him forth for O'Connor's seat, because that was the one that was definitely available, and it was seen by insiders as merely a way station en route to his becoming Chief Justice. With Rehnquist's death, Roberts was promptly moved up in an overnight switch.

---

[8] United States v. Virginia, 518 U.S. 515 (1996). Rehnquist supported the judgment that VMI had violated women's rights, but he suggested a narrow remedy that compelled admission of women to the Institute.

[9] *See generally* CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 1-24 (1993) (discussing the Supreme Court's conservatism, which was partly achieved through the change in the Court's composition).

After the President was rudely reminded of what was demanded of him by his conservative political base in the fiasco over the nomination of White House Counsel Harriet E. Miers to succeed O'Connor, the President reached quite purposefully to the far right of the lower federal bench, and nominated Samuel A. Alito, Jr.—so conservative that the media loved reminding everyone that he had sometimes been called "Scalito," an ideological clone of Justice Antonin Scalia. Alito had been another star in the Reagan Justice Department.

So, there it was: the "Roberts Court," the best and brightest hope of the committed and long-disappointed Reaganites. How soon would great civil rights precedents begin falling? Liberal activist groups like People for the American Way and the Alliance for Justice were persuaded that doomsday was at hand. How long would it be before even *Roe* was overruled? And, if not *Roe* right away, how about *Planned Parenthood v. Casey*, the decision partially reaffirming *Roe*'s core holding? That was one of the most important decisions O'Connor had helped fashion, so its fate could be a bellwether of a changed judicial climate.

And what about the Supreme Court's attitude toward the war on terrorism, and its reaction to the breathtaking claims of presidential war powers asserted by President Bush and Vice President Cheney? There was speculation, not easily dismissed, that a "Roberts Court" would fall meekly in line behind the White House, just as Congress had done since 9/11, even though the Rehnquist Court had refused to do so in 2004 in the first test case.[10] Judge Roberts, on the D.C. Circuit, had been part of a majority on that court to uphold the President's power to create "war crimes" tribunals to try war-on-terrorism suspects held at Guantanamo Bay, Cuba.[11] And Alito, as a young lawyer in the Justice Department, had been a hearty supporter of the Edwin Meese project of expanding presidential power—a project that would pale, in its dimensions, to the Executive ambitions of the George W. Bush presidency.[12]

The addition of Roberts and Alito to the Court, to be sure, did not make a new conservative majority a certainty. Reaganites and the Bush political base had long since lost all hope for Justice David H.

---

[10] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[11] Rumsfeld v. Hamdan, 415 F.3d 33 (D.C. Cir. 2005).

[12] Alito's most significant contribution, so far as is publicly known, involved championing the expanded use of presidential signing statements (public declarations when a president signs a bill into law) to advance Executive authority to say what a law meant, even if contrary to what Congress had legislated. This would become a central tenet of the Bush Administration strategy for enhancing presidential war powers.

Souter, put on the Court by George H. W. Bush, and had grown almost equally exasperated with Justice Anthony M. Kennedy, a Reagan appointee. And those two could be found, regularly for Souter, often for Kennedy, making common cause with the liberal bloc: Justices John Paul Stevens (a Gerald Ford nominee), Ruth Bader Ginsburg, and Stephen G. Breyer (both Bill Clinton nominees). If Roberts and Alito were, in fact, as conservative as President Bush yearned for them to be, they could ally with Justice Scalia (a Reagan appointee) and Justice Clarence Thomas (named by Bush I). But that would still only make four.

The most likely prospect, at least in the short term, then, appeared not to be a Reagan revolutionary Court, but more likely a Court that would imitate the latter years of the Rehnquist Court—a "split-the-difference" Court.[13]

Chief Justice Roberts, as a nominee before the Senate Judiciary Committee, had talked of the virtues of judicial modesty. He gave no indication that he would be prepared to lead a wholesale assault on precedent, and only the deepest cynic could suggest that he was dissembling on the point. Those who knew him were certain that he would want to lead the Court more than he would want to fade into irrelevance as a frustrated, yet ideologically pure, dissenter. After all, at age fifty as he began his service, he had time to wait for the Court of the future to unfold, and ample opportunity to shape it. He would be a conservative, no doubt, and the Court he would lead would be more conservative than Rehnquist's had been; O'Connor's departure made sure of that. But would he, and the Court, be what President Bush and his followers had imagined? Would this be the true "Rehnquist Court" (albeit led by a former Rehnquist clerk) that had never quite come into being?

There is the beginning of a record now—more so for Chief Justice Roberts than for Justice Alito, who, although arriving in time to take part in some of its most important decisions, served just a little more than half of the Court's 2005 term.

---

[13] J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969 (2006) (conceptualizing the jurisprudence of the late Rehnquist Court). Judge Wilkinson applies his label only to the work of the Rehnquist Court in its final five years, and treats this time as a marked shift in its jurisprudence as the Court began to "tackle the most controversial issues before it by splitting the difference" and to "drift into fine-shaven outcomes." *Id.* at 1971. It is at least arguable that the phenomenon he describes could be applied throughout the Rehnquist years, primarily because of Justice O'Connor's abiding devotion to that style of jurisprudence.

Figures[14] compiled by the law firm of Akin, Gump, Strauss, Hauer & Feld LLP[15] show that Roberts and Alito "agreed in full in 89% of the cases they both heard." Roberts agreed with Scalia 85% of the time and with Thomas 83%. But he also agreed 81% of the time with Kennedy. Alito, according to the data, agreed in full with Thomas and Kennedy 76% of the time and with Scalia 74%.[16]

In the term's twelve 5-4 splits, Akin Gump's report says that Kennedy was in the majority nine times, Roberts and Scalia eight each, and Thomas seven. Alito voted on nine 5-4 splits, and was in the majority six times. None of the Court's more liberal members exceeded six times in a 5-4 majority (Ginsburg was in such a majority six times, Stevens and Souter five, and Breyer four).[17]

That is a statistical portrait of a conservative-leaning Court. Somewhat more revealing are some of the details in particular cases. In them, "fine-shaven outcomes," in Judge Wilkinson's phrase, are more evident.

It is possible to argue that this was the pattern in most of the truly major outcomes of the term, including the war on terrorism cases,[18] the Texas redistricting case,[19] the knock-and-announce criminal case,[20] the Clean Water Act cases,[21] and the campaign finance cases.[22]

---

[14] Memorandum from Akin, Gump, Strauss, Hauer & Feld, End of Term Statistics and Analysis—October Term 2005 (June 29, 2006), *available* at http://www.scotusblog.com/movabletype/archives/EndofTermAnalysis.pdf (providing a breakdown of 2005 term cases by "split and unanimous decisions," "agreement between pairs of Justices," and the frequency with which each Justice dissented).

[15] In the interest of full disclosure, note that this is the law firm that sponsors www.scotusblog.com, for which the author is a Supreme Court correspondent. The author operates independently of the firm's law practice.

[16] Memorandum from Akin, Gump, Strauss, Hauer & Feld, *supra* note 14, at 3.

[17] *Id.* at 2.

[18] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (providing a majority opinion as to most sections of the holding and a plurality opinion as to one section of the judgment, with two concurrences and three dissents also filed); *see also* Padilla v. Hanft, 126 S. Ct. 1649, 1650 (2006) (Kennedy, J., concurring) (denying certiorari because of "strong prudential considerations" where the legality of Padilla's current custodial status was uncontested).

[19] League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (illustrating the Court's careful carving of issues, with Justices joining, concurring in part, and dissenting in part for each section of the opinion).

[20] *See* Hudson v. Michigan, 126 S. Ct. 2159 (2006) (achieving a majority for only three of four sections of the opinion, with four Justices dissenting).

[21] *See* Rapanos v. United States, 126 S. Ct. 2208 (2006) (reflecting a plurality opinion of four Justices joining with one concurrence, and four Justices dissenting).

[22] *See* Randall v. Sorrell, 126 S. Ct. 2479 (2006) (providing the Court's resultant opinion as a compilation of sections in which various Justices joined or concurred, with

But, this more revealing, close-up portrait is exceptionally vivid in one field of law that is sure to continue to provide a measure of the Roberts Court's conservative tendencies—that is, of course, the issue of abortion, the prime target of the would-have-been "Reagan Revolution."

It is thus worth examining—early though it may be—the new Court's initial responses in that field to test the proposition. There were a few developments, none of which by itself would qualify among the most significant actions of the term, but each telling in its own right. Two were rulings, and one was an order managing the scope of review in a forthcoming case.

The first was the unanimous ruling in *Ayotte v. Planned Parenthood*,[23] decided on January 18, 2006 (before Justice Alito joined the Court). This holding was one of the early indications of the new Chief Justice's stated desire to encourage more unanimity on the Court, even in controversial areas of its work. He assigned the opinion to Justice O'Connor, one of the architects of *Casey*, who was then about to conclude her service. Probably with some urging from Roberts, the Court's two implacable foes of abortion rights—Justices Scalia and Thomas—were persuaded not only to remain silent, but to join the opinion. That was somewhat remarkable, especially since the Court declared that it was "established" by precedent that "a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'"[24]

It is true that the opinion, at the outset, declared that "[w]e do not revisit our abortion precedents today, but rather address a question of remedy."[25] That perhaps was a way to ward off dissents, but it ordinarily would not appear to have been strong enough to do so in this area of law that so bitterly divides the Court.

Perhaps it helped that the decision was confined to the narrowest possible ground, as an exercise in judicial modesty. The Court ordered a new review of the scope of an injunction against enforcement of the state law at issue. But the Court had been asked, by the state of

---

three Justices dissenting).

[23] No. 04-1144, slip op. (U.S. Jan. 18, 2006), *available at* http://www.supremecourtus.gov/opinions/05pdf/04-1144.pdf (vacating and remanding a First Circuit decision upholding a permanent injunction against enforcement of a New Hampshire law requiring parental notice before a teenager may have an abortion).

[24] *Id.* at 6 (citing, inter alia, the *Casey* decision).

[25] *Id.* at 1.

New Hampshire, to decide a question[26] the Court has never quite settled: the constitutional standard for judging facial challenges to abortion restrictions.[27] The Court has seemed to assume that it would not insist upon the most rigorous standard, but the issue remains open. Several of the amici in the *Ayotte* case had also sought to test that assumption by raising the *Salerno* issue.[28]

A pair of amici, two "individual activists seeking an end to abortion,"[29] boldly asked the Court to address "whether *Roe v. Wade* and its progeny are in fact viable in the face of a growing body of literature that suggests that the court erred."[30] The nation's Catholic bishops also argued in an amicus filing that "we believe *Casey* was wrongly decided."[31]

This is not to suggest that the Court was in any way obliged to address such fundamental issues, but the resistance to temptation, if temptation did exist, may well have been the kind of "judicial modesty" that the new Chief Justice has advocated. Whatever the reason for resisting, the end result was that *Ayotte*, a closely watched new test on abortion rights, created little if any new law.

In a second decision (in which Alito did not participate), the Court swiftly and unanimously put an end to a case that had been the hardest-fought courthouse battle over blockades of abortion clinics—a case lingering in the courts for two decades and twice before decided by the Court.[32] The Court avoided deciding one of the broader issues—whether a private party could sue under the anti-racketeering RICO law for an injunction—and instead resolved narrowly the question of the coverage of violent conduct under the Hobbs Act. Crafted

---

[26] *See* Questions Presented for Review, *available at* http://www.supremecourtus.gov/qp/04-01144qp.pdf (last visited Aug. 30, 2006).

[27] The issue is whether such facial challenges must be judged only by the so-called "*Salerno* standard." *See* United States v. Salerno, 481 U.S. 739, 745 (1987) (holding that a facial challenge may not succeed unless "no set of circumstances exists under which the Act would be valid.").

[28] *See, e.g.*, Amicus Curiae Brief of Liberty Counsel for Petitioner at 4, Ayotte v. Planned Parenthood, No. 04-1144, 2005 WL 1902108 at *10-27 (U.S. 2005) (arguing the *Salerno* standard preserves the balance of rights between courts and legislatures).

[29] Amicus Curiae Brief of Margie Riley and Laurette Elsberry for Petitioner at 1, Ayotte v. Planned Parenthood, No. 04-1144, 2005 WL 1912325, at *2 (U.S. 2005).

[30] *Id.* at 4, WL 1912325 at *5 (citations omitted).

[31] Amicus Curiae Brief of United States Conference of Catholic Bishops and Roman Catholic Bishops of Manchester for Petitioner at 23, Ayotte v. Planned Parenthood, No. 04-1144, 2005 WL 1864092, at *25 (U.S. 2005).

[32] Scheidler v. Nat'l Org. for Women, No. 04-1244, slip. op. (U.S. Feb. 28, 2006), *available at* http://www.supremecourtus.gov/opinions/05pdf/04-1244.pdf.

as it was, the decision had largely symbolic meaning in closing out an angry chapter of abortion jurisprudence. It was also another exhibition of judicial minimalism.

Finally, in the abortion context, the Court put itself in position—over the objection of the Bush Administration—to decide a major new abortion controversy on narrow grounds, thus perhaps avoiding, at least for some time, a reckoning with one of its more controversial precedents. On April 21, 2006, the Court agreed to rule on the constitutionality of the 2003 federal law[33] banning nationwide the so-called "partial-birth abortion" procedure.[34] The law reflects Congress's determination to override the Supreme Court's 2000 decision[35] striking down a Nebraska "partial-birth abortion" ban and finding that such a ban must have a medical exception; Congress insisted in the 2003 law that there never *is* a medical necessity for the procedure it banned.

The Administration had also filed a second appeal involving the federal ban's validity,[36] but it urged the Court simply to put that case on hold, awaiting the outcome of the earlier appeal raising the same constitutional issues. Opponents of the federal ban, however, countered that the Court should go ahead and grant review of the second case, too, arguing that it presented an *Ayotte*-style remedy issue that was not present in the other case. It is at least theoretically possible that, if the Court were to resolve the cases based on the remedy question, it would not have to resolve the underlying constitutional issue, and the validity of the 2000 precedent—seemingly quite endangered in the hands of the new Court—would not be addressed. The Court granted the opponents' request on June 19, 2006.

The stage is thus set for a second round of testing the Roberts Court on abortion. No doubt, too much can be read into one part of the Justices' caseload, just as too much emphasis has been placed upon the abortion question in the White House selection and Senate review of Supreme Court nominees. But there is no bellwether like

---

[33] Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 1, 117 Stat. 1201 (to be codified at 18 U.S.C. 1531).

[34] The case is *Gonzales v. Carhart*, docket 05-380, to be heard in the Court's next term starting Oct. 2, 2006. The sole question presented can be found at http://www.supremecourtus.gov/qp/05-00380qp.pdf (last visited Aug. 30, 2006).

[35] Stenberg v. Carhart, 530 U.S. 914 (2000).

[36] Gonzales v. Planned Parenthood, 435 F.3d 1163 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (U.S. June 19, 2006) (No. 05-1382), *available at* http://www.supremecourtus.gov/qp/05-01382qp.pdf (last visited July 25, 2006) (stating the sole question presented in the Administration petition). This is the second of three cases in which federal courts of appeals have struck down the federal ban.

abortion, and conservative theorists keep looking for ways to push the Court to reconsider that question.[37]

Lawyers for conservative activists continue to fashion cases that they hope can get the Court's attention, and provide a new look even at *Roe* and its companion case, *Doe v. Bolton*.[38] Indeed, with clients of utmost symbolic celebrity in the abortion field—Norma McCorvey ("Jane Roe") and Sandra Cano ("Mary Doe")—a lawyer for the San Antonio-based Justice Foundation has employed a Rule 60(b) motion to attempt to reopen both *Roe* and *Bolton*.[39] The tactic did not work in *McCorvey*[40] but the attorney, Allan E. Parker, Jr., undeterred, is trying in *Cano*.[41] It has been well over a year since McCorvey's appeal failed in the Supreme Court, and there are now two new Justices on the Court. By coincidence, the Eleventh Circuit ruled on Cano's case on the very day that nominee Samuel Alito was being questioned by the Senate Judiciary Committee on the future of the abortion precedents.

Said the Eleventh Circuit:

> Even assuming all the proffered scientific or clinical evidence about the effects of abortion submitted by Cano in support of her Rule 60(b) are true, it does not change the fact that the district court did not have the authority to reverse the Supreme Court's decisions in *Doe* or *Roe*, nor do we.[42]

The Eleventh Circuit also quoted the Supreme Court's *Agostini* decision:

> Which left untouched the bedrock principle that "[i]f a precedent of [the Supreme Court] has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." . . .

---

[37] *See, e.g.*, Steven G. Calabresi, *Text, Precedent, and the Constitution: Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311 (2005) (discussing reasons why the Court should follow the text of the Constitution when it conflicts with precedent).

[38] 410 U.S. 179 (1973).

[39] *See also* Agostini v. Felton, 521 U.S. 203 (1997) (refuting the suggestion, likely in some circles, that this is a fool's errand, since the Supreme Court permitted a Rule 60(b) challenge to a twelve-year-old precedent, *Aguilar v. Felton*, 473 U.S. 402 (1985) and went on to overrule *Aguilar*, a major church-state precedent).

[40] McCorvey v. Hill, 385 F.3d 846 (5th Cir. 2004), *cert. denied*, 543 U.S. 1154 (U.S. Feb. 22, 2005) (No. 05-1382).

[41] Cano v. Baker, 435 F.3d 1337 (11th Cir. 2006), *petition for cert. filed*, 75 U.S.L.W. 3065 (U.S. July 31, 2006) (No. 06-162).

[42] *Id.* at 1342.

The Supreme Court has never overruled *Roe* or *Doe*.[43]

[43] *Id.* (citing Agostini v. Felton, 521 U.S. 203, 237 (1997)).